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IN THE

Supreme Court of the United States

October Term, 1982

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,
Petitioners,

v.

H. ANITA LINCOLN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

JIM O. LLEWELLYN
Senior Assistant
Attorney General

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Telephone: 404-656-3389

QUESTION PRESENTED

Where a jury verdict forecloses recovery on the employment discrimination claim actually alleged and tried by a plaintiff, may a federal court, consistent with "due process", extend plaintiff a post-trial "helping hand" by restructuring her case so as to posit liability against the defendant State Agency employer on a judicially fashioned post-trial claim, *i.e.*, a "claim" which plaintiff never made herself either before or during trial, and as to which the defendant State Agency consequently has had neither "notice" nor any opportunity to present a defense?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiff-Appellant

H. Anita Lincoln.

Defendants-Appellees

Board of Regents of the University System of Georgia
Clyde W. Hall
Evanel R. Terrell

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Lincoln v. Board of Regents of the University System of Georgia, et al.*, 697 F.2d 928 (11th Cir. 1983). Petitioners' motion for rehearing and suggestion for rehearing en banc were denied by the the Court of Appeals on April 25, 1983, without further opinion. The reported opinion of the Court of Appeals, the district court's opinion (unreported), the Court of Appeals' judgment, and the Court of Appeals' order denying rehearing and the suggestion for en banc reconsideration, are all included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was rendered and entered on February 10, 1983, with the order of that Court denying petitioners' motion for rehearing and suggestion for rehearing en banc being rendered and entered on April 25, 1983. This petition for a writ of certiorari is filed within the ninety days of the Court of Appeals' denial of the motion for rehearing and suggestion of en banc reconsideration. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., Amend. VII:

> "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2:

"(a) It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . ."

42 U.S.C. § 2000e-5:

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .

* * *

(g) If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court court deems appropriate. . . ."

STATEMENT OF THE CASE

This is a "reverse discrimination" case brought by a former white faculty member (non-tenured) at a highly integrated but yet predominantly black college of the University System of Georgia, (*i.e.*, Savannah State

College). Having been found wanting in competency by her students, her administrative superiors (white as well as black), as well as by two different racially mixed faculty review committees, Respondent was not offered a new employment contract for the nine month academic year commencing in September, 1978 and ending June 30, 1979. While Respondent had at no time contended that "race" was involved during her hearings before the two racially mixed faculty review committees, she filed an EEOC charge on or about February 8, 1979, in which she contended "I believe I was not offered an employment contract *in September 1978*, to teach at Savannah State College *for the 1978/79 academic year* because I am white" (emphasis added).

Requesting and receiving a "right to sue" letter, Respondent filed her complaint in the United States District Court for the Southern District of Georgia on November 19, 1979, alleging that her formal employer, the Board of Regents of the University System of Georgia (defendant below and now Petitioner) had through its supervisory agents, the defendants Clyde W. Hall, Evanel R. Terrell and Diana Wagner [1] "with intent and purpose, engaged in activities to terminate the Plaintiff from her employment at Savannah State College because of Plaintiff's race". Respondent's complaint asserted that this allegedly racially motivated termination of her employment gave rise to two separate legal claims. She contended first that the actions of the named individual defendants, since they were agents of the Board of Regents, gave her a right of action against the Board as *respondeat superior* under Title VII of the Civil Rights

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[1] Diana Wagner was subsequently voluntarily dismissed as a party defendant by the Respondent.

Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*). It was further asserted that the same actions of these individual defendants (*i.e.*, the Board's supervisory agents) also violated rights secured to her under 42 U.S.C. § 1981.

Petitioners (defendants below) responded to the complaint by contending, among other things, that the individual defendants Hall and Terrell were not amenable to the Title VII claims since they were not Respondent's "employer" within the meaning of that Act, and that the Board of Regents was for a number of reasons, including the Eleventh Amendment, not subject to the § 1981 claim. During the pre-trial conference, Respondent agreed with Petitioners on these points, and the case consequently proceeded to trial against the individual defendants (Hall and Terrell) alone on the § 1981 claim, with the Title VII claim, while based upon the actions of these same individuals, proceeding solely against the Board of Regents under the doctrine of *respondeat superior*.

The matter came on for trial on November 3, 1980. A jury empaneled to hear the § 1981 claim returned a verdict in favor of the individual defendants, Acting President Hall (who admittedly made the 1978 non-renewal decision giving rise to the action) and Evanel Terrell (a retired faculty member who had formerly been Respondent's direct administrative superior). Judgment was entered in accordance with the jury verdict on the § 1981 claim.

It was in connection with the Title VII claim that the problems giving rise to the instant petition arose. With the legal claims (*i.e.*, § 1981) and the equitable claims (Title VII) being tried together, the district court directed the jury to render an advisory verdict on the Title VII

claim along with its binding verdict on the § 1981 claim. Notwithstanding the jury's exoneration of the Board's supervisory agents as to the legal claims (*i.e.*, § 1981), on the Title VII claim, it returned an advisory verdict *against* the principal (the Board of Regents), which the district court itself described as a "rather bizzarre result" (Tr. 379). Recognizing that this purely advisory opinion was not binding on it as to the Title VII equitable claim, the district court determined that it would make its own "full and independent review of the evidence presented at this trial" (Appendix, p. 2d). It did so, and pointing to what it considered to be evidence of racial animus on the part of the two supervisory agents exonerated by the jury in its binding § 1981 verdict (*i.e.*, Acting President Hall and Mrs. Terrell), it held that "impermissible racial animus" was a substantial factor in Respondent's non-renewal, and that the Board of Regents was consequently liable as *respondeat superior*. In its opinion the district court also noted that the actions of the former President of Savannah State College, Dr. Prince Jackson, *in 1977* (*i.e.*, one year before the 1978 "non-renewal" upon which Respondent has based her case) had to the district court's way of thinking amounted to a "constructive discharge". In 1977, Dr. Jackson, who appeared as Respondent's principal witness, altered her employment status from classroom instruction to administration. Naturally, Respondent never alleged or contended, either before or during the trial, that her principal witness was a "wrong-doer", or in any way involved in the *1978* non-renewal decision of Acting President Hall upon which she had based and tried her case. Nor did the district court find any racial animus on the part of Dr. Jackson. It instead appeared to view his testimony (favorable to Respondent's "paper" qualifications) as having somehow nullified

the Board of Regents' "articulation" of legitimate academic reasons, such as the purely academic performance deficiencies found by two racially mixed faculty review committees, for Respondent's 1978 non-renewal.[2]

The Petitioner Board of Regents of the University System of Georgia appealed on the ground, *inter alia*, that the judgment of the district court conflicted with the Seventh Amendment because a jury verdict on factual issues common to jointly tried law-equity cases is binding on the trial court as to the equity claims as well as to the legal claims, *e.g.*, *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974); *Dairy Queen v. Wood*, 369 U.S. 469, 479 (1962); *Davis v. Ampthill Rayon Workers, Inc.*, 446 F.Supp. 681, 683 (E.D. Va. 1978), *aff'd.*, 594 F.2d 856 (4th Cir. 1979), coupled with the settled rule that where liability of the master or employer is asserted under the doctrine of *respondeat superior*, exoneration of the servant, employee or agent exonerates the master, employer or principal. *E.g.*, *Barnes v. West Point Foundry and Machine Company*, 441 F.2d 532, 533 (5th Cir. 1971); *Millhollan v. Watkins Motors Lines, Inc.*, 116 Ga.App. 452, 454 (1967); 3 C.J.S. *Agency* § 423, p. 280.

On February 10, 1983, the Court of Appeals, in a split decision, while agreeing with Petitioner's *legal* analysis concerning the Seventh Amendment and *respondeat superior*, nonetheless affirmed the district court. A majority of the Court of Appeals' Panel concluded that the wrongful (*i.e.*, racially discriminatory) action was in fact the *1977* "constructive discharge" by former President

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[2] The Court of Appeals' decision recognizes that the District Court erred in its rejection of Petitioners' "articulation" of legitimate non-discriminatory reasons for the 1978 non-renewal of Respondent's employment. *See* 697 F.2d 928 at p. 938. n.13; Appendix, pp. 18a-19a

Prince Jackson when he changed Respondent's employment status from instruction to administration.

What we have, in other words, is a Court of Appeals' decision which would posit liability on a claim not made by the Respondent at any time before or during trial. It is a claim which has sprung full blown as Minerva from Jupiter's head, a child of post-trial "judicial creativity". As the dissent of Judge Hatchett points out, this new "claim" was never presented, or even hinted at, by anyone until the trial was over. The Board of Regents of the University System of Georgia is consequently being subjected to substantial pecuniary liability based upon a claim as to which it has never had any notice, and against which it has never had an opportunity to present available defenses, not the least of which is a time bar (also noted in the dissenting opinion of Judge Hatchett).

REASONS FOR GRANTING THE WRIT

In positing Title VII liability on a "claim" which the aggrieved employee never made (the purported wrong, wrongdoer, and time of the wrongful act all having been first *judically* discerned and identified *after* trial) the Court of Appeals would impose substantial liability against a State agency defendant based upon a claim as to which the agency has had no notice and consequently no opportunity to present a defense. Drawn into question is the fundamental fairness of a federal judicial proceeding in the context of the *due process* "right to defend". The majority opinion of the Court of Appeals conflicts with settled decisions of this Honorable Court and would sanction a drastic departure from accepted minimal norms of judicial fairness. We consequently think that decision below is one which would merit this Honorable Court's exercise of its discretion in

favor of granting the writ and reversing the decision below.

(1) **The error below.**

Title VII expressly limits a district court's remedial action under the Act to the correction of only those unlawful employment practices *charged in the complaint.* 42 U.S.C. § 2000e-5(g). From the time the instant complaint was filed until after the trial was over, it was never contended by the Respondent (plaintiff below) other than that the Board of Regents' supervisory agents alleged to have acted out of impermissible racial motivation, the agents for whose actions the Board of Regents was consequently said to be liable, were Acting President Clyde W. Hall and Evanel R. Terrell. The complaint shows quite clearly that it was the *single* alleged wrong of a racially motivated *1978 contract non-renewal decision by these specific agents* (Hall and Terrell) which was the basis of both Respondent's § 1981 claim and her Title VII claim. Paragraph 6 of the complaint alleges:

> "the Defendant, BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, has through its agents, Defendants CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER, with intent and purpose, engaged in activities to terminate the Plaintiff from her employment at Savannah State College because of Plaintiff's race."

Paragraph 9 of the Complaint alleges that these activities violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, with paragraph 10 contending that the same acts and practices also violated 42 U.S.C. § 1981.

In the "Amended and Substituted Joint Status Report", submitted to the district court by the parties on July 3, 1980, Respondent agreed that the central issue was the reason why Respondent wasn't offered an employ-

ment contract "for the school year beginning Fall of *1978*". This same affirmation by Respondent as to what she was contending appeared again in the Pre-trial Order, where in outlining her case, Dr. Lincoln said:

> "Because of her race she was not given a contract for employment *for the school year beginning Fall of 1978*, and individual Defendants, CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER intentionally interfered with her employment contract so as to ultimately prevent her from being rehired *for the year 1978 and 79*. The reason for these interferences were principally based on race." (R. 46). (emphasis added)[3]

Nor did Respondent waiver from her contention that it was the specific individual defendants Hall and Terrell, and the *1978* decision not to give her a new employment contract, upon which she hinged her Title VII action, even *after* the jury verdict in favor of the individual defendants on the 42 U.S.C. § 1981 claims. In submitting proposed facts and conclusions of law to the district court after the trial in connection with the still pending Title VII claim, Respondent suggested the following:

> "11. In summary, the evidence showed that Dr. Lincoln was qualified for her position and that she was in a racial minority. Furthermore, her removal from the Department of Home Economics and her failure to be rehired was principally based on race. The Defendant Board of Regents' rebuttal was countered by evidence that their alleged justifications were a sham for disguising a racially motivated intent. The Court concludes that Defendants Hall and Terrell were attempting to, by indirect means, accomplish a result which they could not do directly,

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[3] As previously indicated, Diana Wagner was subsequently voluntarily dismissed as a party defendant by Respondent.

> *i.e.*, to terminate a white instructor in the Department of Home Economics and ultimately replace her with a black."

The Court of Appeals' decision fully recognized that the single *factual* claim which Respondent had alleged and tried could not, in light of the jury's exoneration of the named agents and the Seventh Amendment, serve as the basis for the imposition of Title VII liability. See 697 F.2d 928 at p. 935; Appendix, pp. 9a, 10a What it did was to predicate liability on a newly thought of "claim" which Respondent had not alleged or tried. It was only after the trial was over, and all opportunity to defend had passed, that this burst of judicial creativity took over and the words "constructive discharge" were first mentioned (and then, by the courts, not by plaintiff-respondent).

This *post-trial* judicial fashioning of an entirely new claim, complete with a newly identified "wrong", a new "wrongdoer", and a "wrong" which had occurred one year earlier than the 1978 contract non-renewal upon which Respondent had based and tried her case, was presumably fashioned to assist Respondent around the Seventh Amendment. In fact it maneuvered the case into an even more untenable position, a position reaching to the fundamental fairness of a federal judicial proceeding. In question is what we had thought to be the settled right of a defendant to know what the claim asserted against it is (in terms of *who* did *what* to *whom*) sufficiently *in advance of trial* so as to enable it to present a defense to that claim.

On the face of it, it seems to be passing strange to say that a defendant which has successfully defended against the claim actually presented by plaintiff in her complaint,

as well as the only claim asserted by the plaintiff at any time before or during trial, may nonetheless be held vicariously liable for substantial monetary damages because it didn't defend against a different "claim" which wasn't made by the plaintiff (or suggested by the Court) at any tme before or during trial but which first saw the light of day via an exercise of post-trial judicial imagination. As the dissenting opinion (Judge Hatchett) points out respecting this post-trial judicial substitution of a new case for the one alleged and tried by Respondent;

> "No one, other than the judges in this case, ever considered Dr. Jackson's actions as the acts giving rise to this lawsuit." See 697 F.2d 928 at p. 944; Appendix, p. 31a.

Were we for conceptual purposes to analogize the instant case to a hypothetical example of a "criminal" *respondeat superior* situation, the "due process" implications of a post-trial judicial substitution of both the alleged crime and the alleged criminal for that set forth in the indictment, would be obvious. Would anyone seriously suggest that a defendant who stood to be exonerated as the answerable "employer" or "superior" by virtue of the jury's acquittal of the charged "agent" or "employee", could nonetheless be found guilty (or liable) if *after* the trial a court were to conclude that *some other employee* may have committed *some other crime* (not charged and hence not defended against)? Does anyone really think that vicarious liability could thus be predicated on charges not made, against an actor not identified, until the trial was over and all opportunity to defend past?

We respectfully submit that the fact that this case is "civil" rather than "criminal" makes no difference when

it comes to what surely must be recognized as essential fairness and "due process" in a federal judicial proceeding. In *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), this Court said that:

> "Due process requires that there be an opportunity to present every available defense."

The "right to defend" manifestly presupposes a right to know what a complainant's claim is in terms of "who" is supposed to have done "what" to "whom", since the "due process" right to present a defense would otherwise be "but a barren one". *See, Morgan v. United States*, 304 U.S. 1, 18 (1938). Until now, we had thought it settled law that as stated by this Court in *Gonzales v. United States*, 348 U.S. 407, 414n.5 (1955), that:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."

In the case at bar, the post-trial judicial substitution of a new actionable "wrong" at the hands of a newly identified "wrongdoer" (*i.e.*, as the majority put it, "the critical finding that *Prince Jackson* constructively discharged Dr. Lincoln" *in 1977*) for the claimed wrong which Respondent had in fact alleged and tried (*i.e.*, the decision by Acting President Hall, one year later, in *1978*, not to offer Dr. Lincoln a new employment contract for the school or academic year commencing September 1978) obviously deprived petitioner Board of Regents of any opportunity to defend itself against this post-trial "claim". Not having been faced with this claim at the trial, surely it cannot be maintained that Petitioner was lacking in diligence in failing to defend against the then non-existent claim. It might well be pointed out *en passant* that the right of a

defendant in a lawsuit to know *what* he is faced with *before* trial, has been viewed by at least five circuits as being so basic, so fundamental, as to call for dismissal of a complaint which fails to set forth these minimal facts, on the ground that such a complaint wholly fails to state a claim upon which relief can be granted.[4] As the First Circuit said in *Dewey v. University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982):

> "It is not enough to allege a general scenario which could be dominated by unpleaded facts. . . . Therefore, although we must ask whether the 'claim' put forward in the complaint is capable of being supported by any conceivable set of facts, we insist that the claim at least set forth the minimal facts, not subjective characterizations, as to who did what to whom and why."

(2) **The deprivation of Petitioner's right to present a defense is real and not merely theoretical.**

Nor can it be said that the want of essential fairness in the deprivation of Petitioner's right to defend itself was theoretical rather than real. Substantial defenses were available to Petitioner and would unquestionably have been used had the "constructive discharge" claim been presented by Respondent, or so much as suggested by the Court, at any time before, or even during, the trial.

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[4] *See Dewey v. University of New Hampshire*, 694 F.2d 1, 3-4 (1st Cir. 1982); *United States v. City of Philadelphia*, 644 F.2d 187, 204 (3d Cir. 1980); *Cohen v. Illinois Institute of Technology*, 581 F.2d 658, 663 (7th Cir. 1978); *Anderson v. Sixth Judicial District Court*, 521 F.2d 420 (8th Cir. 1975); *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620, 622-623 (2d Cir. 1972).

(a) **The so-called "constructive discharge" in 1977.**

Perhaps one reason Respondent never alleged or contended that Dr. Jackson's *1977* decision about changes in her employment status amounted to a "constructive discharge", is the fact that Dr. Lincoln expressly agreed to this change in her employment status. In her EEOC charge plaintiff stated:

> "On September 30, 1977, I was informed by letter from Dr. Jackson that I was being employed for the 1977/78 academic year in duties of a non-teaching nature.
>
> I accepted Dr. Jackson's offer of continued employment with SSC under the terms of a verbal agreement between myself, Dr. Jackson and Dean Byers during a conference on October 3, 1977 in which it was agreed that my personnel file would be purged of all letters, documents and references concerning negative and/or questionable events between me and the administration of SSC; that I would be given a signed contract for the period 1977 through June 30, 1978; that my faculty status as a professor in Home Economics would be retained and that I would report to and be under the direction of Dean Byers. I had previously been advised in writing by Dr. Jackson that I could apply for reinstatement to a teaching position during the Spring Quarter of 1978, I applied for such reinstatement. . . ."

"Working conditions" to which the Respondent expressly agreed (*e.g.*, an adminstrative assignment rather than classroom teaching) cannot be said to be so "intolerable" as to amount to a "constructive discharge". *See Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). This conclusion is supported by the fact that in her EEOC charge as in her complaint Dr. Lincoln in fact based her employment discrimination claim upon the decision made

by Dr. Hall in *1978* not to offer her an employment contract for the academic year 1978-79 (commencing September, 1978), not upon any purported "constructive discharge" by Dr. Jackson a year earlier, in 1977.

(b) **The claim discovered by the courts after the trial was over would among other things be time barred.**

Title VII requires aggrieved persons to file their complaint with EEOC within 180 days after the occurrence of the allegedly unlawful employment practice. 42 U.S.C. § 2000e-5(e). The record shows that Dr. Lincoln was temporarily suspended from her teaching assignments on February 18, 1977 (TR. 278-279; Def. Ex. 8). Following adverse decisions concerning her competency by two racially mixed faculty committees, the then President, Dr. Prince Jackson, developed "second thoughts" about the matter and offered Dr. Lincoln a non-teaching contract, with a responsibility of generating external funding, for the 1977-78 academic year. Plaintiff, in her EEOC charge, said that she agreed to this personnel action (*i.e.*, the so-called "constructive discharge") on October 3, 1977. The EEOC charge, which was filed on or about February 8, 1979, manifestly could not cover any so-called "constructive discharge" which occurred during *1977*. As the dissenting opinion of Judge Hatchett recognizes, the "constructive discharge" idea which occurred to the courts only after the trial was over, is among other things time barred for want of a timely filing of the EEOC charge. *See* 697 F.2d at p. 944; Appendix, p. 31a.

CONCLUSION

For all of the reasons stated the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be granted and the decision below reversed by this Honorable Court.

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

JIM O. LLEWELLYN
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

Please address all
communications to:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334

(404) 656-3389

APPENDIX

OPINION OF THE COURT OF APPEALS
H. Anita LINCOLN, Plaintiff-Appellee, Cross-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and Clyde W. Hall and Evanel R. Terrell, Defendants-Appellants, Cross-Appellees.

No. 81-7297.

United States Court of Appeals,
Eleventh Circuit.

Feb. 10, 1983.

Appeals from the United States District Court for the Southern District of Georgia.

Before RONEY and HATCHETT, Circuit Judges, and WISDOM*, Senior Circuit Judge.

WISDOM, Senior Circuit Judge:

The Board of Regents of the University System of Georgia appeals from a judgment for Dr. Anita Lincoln on her employment discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* From 1974 through 1978, Dr. Lincoln was employed under four separate one-year contracts as a nontenured professor of home economics at Savannah State College, a state school subject to the oversight of the Board of Regents. When her contract was not renewed in 1978, she brought this action in the United States District Court for the Southern District of Georgia, alleging that the decision not to offer her a fifth contract was racially motivated. Dr. Lincoln is white, and Savannah State is an integrated, but historically and predominantly black, institution.

*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Dr. Lincoln's complaint sought reinstatement and back pay under Title VII and compensatory and punitive damages under the Civil Rights Act of 1866, 42 U.S.C. § 1981. It named as defendants the Board of Regents and two members of the Savannah State faculty, Mrs. Evanel Terrell and Dr. Clyde W. Hall.[1] Mrs. Terrell was head of the home economics department during Dr. Lincoln's first two years at Savannah State. Dr. Hall was head of the technical sciences division, which includes the home economics department, during most of Dr. Lincoln's term of employment and was acting president of the college in 1978, when Dr. Lincoln was not offered a new contract. Both Mrs. Terrell and Dr. Hall are black.

Before the case went to trial, the district court dismissed the § 1981 claim against the Board of Regents, on the ground of sovereign immunity. It also dismissed the Title VII claim against the individual defendants, on the ground that they were not "employers" within the meaning of the statute. The court empaneled a jury to decide the § 1981 claim against Mrs. Terrell and Dr. Hall and instructed it to return an advisory verdict on the Title VII claim against the Board.[2] The jury returned a verdict for the individual defendants, and the district court entered judgment accordingly. In its advisory verdict, however, the jury recommended judgment for the plaintiff against the Board. The district court entered its own findings of fact and conclusions of law, granting judgment in accord with the advisory verdict. The court awarded

[1] The complaint also named Ms. Diana Wagner, a black member of the home economics faculty, as an individual defendant. The claim against Ms. Wagner was voluntarily dismissed before the trial.

[2] The seventh amendment requires a jury trial in an action for damages under § 1981 but not in an action for reinstatement and backpay under Title VII. *See* p. 8. Before trial, the district court denied a motion by the Board of Regents for separate trials.

Dr. Lincoln back pay and attorney fees and ordered the Board of Regents to purge its records of all references to the events leading to Dr. Lincoln's departure.[3]

The Board brought this appeal, contending that the district court's judgment against it violated the seventh amendment, because it was premised on the theory of *respondeat superior* and was therefore inconsistent with the facts as found by the jury in exonerating the individual defendants, the Board's agents. The Board also contends that the district court's findings were clearly erroneous. Dr. Lincoln filed a cross-appeal, urging that the jury's verdict on the § 1981 claim was inconsistent with its advisory verdict on the Title VII claim and must be set aside. We reject all the arguments of the appellant and the cross-appellant and affirm the judgment of the district court.

I. Factual Background

Our review of the district court's decision in this case is best understood against a background that goes back to the beginning of Dr. Lincoln's career at Savannah State. Her career was marked throughout by personal friction, particularly with Mrs. Terrell, and by complaints of students and some other faculty members. Neither the friction nor the complaints can be attributed entirely to Dr. Lincoln's professional deficiencies or to racial bias. Her history at Savannah State seems to establish only that elements of both were present.

When Dr. Lincoln arrived at Savannah State College

[3] The court found reinstatement impracticable in view of the small size of the home economics department and the severe friction that had developed between its members and Dr. Lincoln in connection with the events giving rise to this lawsuit. No question concerning remedies is before us on this appeal.

under a one-year contract in the fall of 1974, she was in her middle fifties and had an extensive background in home economics, specifically dietetics. She had several degrees, including a Ph.D., and considerable experience in governmental and administrative work germane to her area of expertise. Her familiarity with certain practical and elementary aspects of her subject, however, particularly those associated with introductory courses and laboratory instruction, was limited. At the time of her arrival, her supervisors were Mrs. Terrell and Dr. Hall. Dr. Hall had been head of the division of technical sciences since 1961. He served in that position until 1976 and again from 1977 until March 1978. He was acting president of Savannah State from that time until 1980. Mrs. Terrell had been head of the home economics department since 1947. Both Mrs. Terrell and Dr. Hall recommended Dr. Lincoln's appointment in 1974 and knew at the time that she was white.

It was not long before Dr. Lincoln encountered problems with both students and faculty. Friction developed between her and Mrs. Terrell in particular. Mrs. Terrell, and Dr. Hall as well, viewed themselves as supervisors, while Dr. Lincoln was accustomed to considerable professional independence. Mrs. Terrell found Dr. Lincoln insubordinate in several instances, particularly when she moved a class without consulting Mrs. Terrell and when she failed to file a required inventory. As our discussion in Part III will elaborate, there was evidence, and the district court found, that Mrs. Terrell's reactions to any insubordination on Dr. Lincoln's part were exacerbated by racial bias.

Mrs. Terrell soon began complaining to Dr. Hall about Dr. Lincoln. Dr. Hall was not convinced that Dr. Lincoln

was incapable, however, and he offered her a second contract for the 1975-76 term. The problems between Dr. Lincoln and Mrs. Terrell continued, and in October 1975, Mrs. Terrell wrote to Dr. Hall concerning alleged inadequacies in Dr. Lincoln's performance. Dr. Hall held a conference with Dr. Lincoln and Mrs. Terrell, and Dr. Lincoln said that she had neither interest nor ability in teaching laboratory work but that she would try to improve.

Mrs. Terrell wrote to Dr. Hall again in January 1976, recommending that Dr. Lincoln not be offered a new contract. She wrote a third letter in May of that year, recommending dismissal, and at this time, students as well had begun to complain of Dr. Lincoln's inadequacies. Dr. Hall nevertheless remained cautious, hoping the situation would improve. He offered Dr. Lincoln a contract for the 1976-77 term but wrote her that the department had been "badly disappointed" with her performance and that he expected a "tremendous improvement" as a condition to reappointment. A second conference took place during the summer, at which Dr. Lincoln again promised to improve. In the fall of 1976, student complaints continued, and Dr. Hall visited several of Dr. Lincoln's classes to investigate her performance. As he testified at trial, he observed several serious deficiencies but took no immediate action.

In February 1977, several students in the home economics department signed a petition calling for Dr. Lincoln's removal. The petition bore 37 signatures and asserted numerous serious inadequacies on Dr. Lincoln's part. The allegations centered on delinquency in teaching methods,[4] a smell of alcohol on Dr. Lincoln's person, and

[4] More specifically, the petition alleged that Dr. Lincoln failed to order books and other materials, failed to return projects with proper

absenteeism and lateness. One allegation also concerned Dr. Lincoln's insubordination toward Mrs. Terrell.[5] The district court, relying on evidence we will discuss in Part III, found that the "direct and clear appeal of the petition is racial" and that Mrs. Terrell, who had retired the previous summer, and perhaps other faculty members as well, had played some role in originating it. Dr. Hall later discovered that the petition had been typed in his office on college stationery.

Apparently prompted by the petition, Dr. Hall suspended Dr. Lincoln from teaching duties on February 18, 1977. He stated, however, that he was still trying to keep the situation under control. On February 24, he held a meeting with Dr. Lincoln, Dr. Teresa Anthony, a white faculty member who was acting as department head following Mrs. Terrell's retirement, and Dr. Thomas Byers, Dean of the College and Dr. Hall's immediate supervisor. Only specific charges concerning Dr. Lincoln's performance as a teacher were discussed, as Dr. Hall considered racial charges an inappropriate basis for action. Dean Byers also held a meeting with Dr. Lincoln and students, in a ineffective effort to "restore confidence".

On March 10, 1977, Dr. Anthony wrote to Dr. Hall, recommending "immediate termination" of Dr. Lincoln, based on "incompetency and lack of accountability". Dr. Hall still felt that the situation could be improved without such drastic action. He asked Dr. Anthony to withdraw her suggestion, but she refused. Her letter then

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evaluations, held laboratories without adequate lecture preparation, inadequately prepared for classes, lost examination papers, gave unwarranted high grades to offset inadequacy in instruction, and dressed improperly for laboratories.

[5] The incident referred to in the petition concerned a letter from Dr. Lincoln to Dr. Hall stating that Mrs. Terrell had misinformed her students about certain requirements for internships.

became the basis for formal action.

After attempts at mediation failed, a faculty committee was appointed to review student charges. The committee consisted of Ms. Diana Wagner, a black assistant professor of home economics, and two faculty members from unrelated disciplines, Dr. Luetta Millege and Mrs. Gaye Hewitt. The committee heard testimony from Dr. Anthony and nine students and, in a letter to the president of the college, recommended that Dr. Lincoln be suspended for the remainder of the term and offered no renewal or, alternatively, that she be dismissed immediately. The president, Dr. Prince Jackson, then notified Dr. Lincoln that she was being terminated immediately, although, as he testified, he considered the case against her "weak".

Dr. Lincoln appealed her termination, and a second faculty committee reviewed her appeal. After interviewing students and faculty, the committee found her incompetent, although a minority report questioned the sufficiency of the evidence. The committee also criticized unnamed faculty members for the exploitation of student unrest and their involvement in the petition for Dr. Lincoln's removal. The committee recommended that Dr. Lincoln be given temporary employment, to allow her an opportunity to resign. Shortly after the committee made its recommendations, Dr. Hall wrote to President Jackson, urging that "the integrity of this institution would be threatened" if Dr. Lincoln were retained.

Before acting on the committee's recommendation, President Jackson decided to investigate on his own the circumstances surrounding the student petition. He found that faculty members not only had been involved but had exerted unfair pressure on students to sign. He concluded

that Dr. Lincoln had been treated unfairly and did not believe her incompetent. He therefore offered her a new contract for the 1977-78 term. Dr. Lincoln was given a new position, however, which involved no teaching. She was assigned to the Dean's office, with responsibility for updating the faculty handbook and securing government grants. President Jackson informed Dr. Lincoln that he would review her status at the end of the 1977-78 school year. At that time she would be retained only if she generated sufficient outside funding to pay her own salary.

When the time for review arrived, Dr. Hall had taken over as acting president, but President Jackson had left him instructions concerning review of Dr. Lincoln's position. Accordingly, Dr. Hall asked Dr. Lincoln to submit an accounting of her work for the 1977-78 term. Dr. Lincoln did not comply with the request, apparently because she felt that in view of Dr. Hall's opinion that she was a threat to the integrity of the college, it was unlikely that he would consider her favorably. Dr. Lincoln did not apply for a new contract, and Dr. Hall, upon receiving no response to his request for an accounting, decided not to offer her one. The district court found that "even had Dr. Lincoln complied with Dr. Hall's request, she would not have been continued", because "there is no reason to believe that [she] had generated . . . funding in the requisite amounts".

II. The Seventh Amendment

We consider first the Board's argument that the judgment against it violated the seventh amendment. That amendment provides, in pertinent part, that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law". The Board of Regents argues that the

judgment against it rests on an impermissible re-examination of facts found by the jury in the § 1981 action against Mrs. Terrell and Dr. Hall. According to the Board, the judgment on the Title VII claim was predicated on the theory of *respondeat superior* and on illegal discrimination by the individual defendants as its agents. Because the jury exonerated the individual defendants, the Board argues, the district court could not, consistently with Seven Amendment, hold their principal liable on this theory.

[1-4] An action for reinstatement and backpay under Title VII is by nature equitable and entails no rights under the seventh amendment. *Lehman v. Nakshian*, 1981, 453 U.S. 156, 163-64, 101 S.Ct. 2698, 2703-04, 69 L.Ed.2d 548, 555-56; *Johnson v. Georgia Highway Express, Inc.*, 5 Cir.1969, 417 F.2d 1122, 1125. An action for damages under § 1981, however, is by nature legal and must be tried by a jury on demand. *See Whiting v. Jackson State University*, 5 Cir.1980, 616 F.2d 116, 122 & n. 4. When legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both. *See Curtis v. Loether*, 1974, 415 U.S. 189, 196 n. 11, 94 S.Ct. 1005, 1009, n. 11, 39 L.Ed.2d 260, 267; *Dairy Queen, Inc. v. Wood*, 1962, 369 U.S. 469, 470-73, 82 S.Ct. 894, 896-97, 8 L.Ed.2d 44, 47-48. When a party has the right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim.

[5] According to the Board of Regents, when the jury in this case exonerated the individual defendants in the § 1981 action, it decided the critical issue in the equitable action against the Board, since the Board's liability could

follow only from the wrongful acts of its agents. Undoubtedly, a verdict exonerating an agent while holding his principal liable for his actions would be an inconsistent resolution of factual questions. *See Barnes v. West Point Foundry and Machine Co.*, 5 Cir.1971, 441 F.2d 532; *Dixie Ohio Express Co. v. Poston*, 5 Cir.1948, 170 F.2d 446, 448. Dr. Lincoln argues, however, that the district court in the present case could legitimately make independent factual findings inconsistent with the jury's verdict in the § 1981 action. According to Dr. Lincoln, *Dairy Queen, Inc. v. Wood* governs only cases in which legal and equitable claims against a single defendant are tried together; it is not binding here because the Board of Regents, as a party to an equitable action only, has no constitutional right to a jury trial on any issue.

[6, 7] We know of no case either adopting or rejecting the distinction Dr. Lincoln urges upon us. We leave the choice between these alternatives for yet another case, however, because the case before us does not require us to make it. *See Ashwander v. Tennessee Valley Authority*, 1936, 297 U.S. 288, 346-47, 56 S.Ct. 466, 483, 80 L.Ed. 688, 711 (Brandeis, J., concurring); *White v. United States Pipe & Foundry Co.*, 5 Cir.1981, 646 F.2d 203, 206. The district court's judgment in this case is not inconsistent with the jury verdict on the § 1981 claim.

We have no doubt that a judgment holding a principal liable in a Title VII case of this type would be inconsistent with a verdict exonerating under § 1981 the employees from whose actions Title VII liability derives.[6] This,

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[6] When, as in this case, the plaintiff predicates liability under Title VII on disparate treatment, the legal elements of the claim are identical to those of a claim under § 1981. *Whiting v. Jackson State Univ.*, 5 Cir.1980, 616 F.2d 116, 121; *see also Scarlett v. Seaboard Coast Line*

however, is not the case here, because the district court did not predicate the Board's liability on the actions of Mrs. Terrell or Dr. Hall. Dr. Hall, as acting president of the college in 1978, had the final opportunity to offer Dr. Lincoln a new contract. The district court, however, found that President Jackson, whose liability the jury in the § 1981 action never considered, was in fact responsible for Dr. Lincoln's departure from Savannah State. The court reached this conclusion by two routes.

First, the district court found that Dr. Hall did not reject Dr. Lincoln's application for a new contract, because she never submitted a formal application. The court further found that intolerable conditions surrounding her employment at Savannah State had prompted her not to apply and that these conditions, for which President Jackson was responsible, amounted to "constructive discharge". *See Bourque v. Powell Electric Manufacturing Co.*, 5 Cir.1980, 617 F.2d 61, 64-65; *Young v. Southwestern*

R.R., 5 Cir.1982, 676 F.2d 1043, 1053. A plaintiff asserting either claim must prove intentional discrimination. *See Baldwin v. Birmingham Bd. of Educ.*, 5 Cir.1981, 648 F.2d 950, 954. In either case, the plaintiff can create a rebuttable presumption of discrimination by proving the elements of a *prima facie* case as discussed in Part III. *Id.* at 955. And the respective burdens of the plaintiff and defendant after a *prima facie* case is established are the same in both cases. *See McWilliams v. Escambia County School Bd.*, 5 Cir.1981, 685 F.2d 326, 331.

These similarities do not exist when liability under Title VII is premised on the disparate impact of a facially neutral employment practice, rather than on disparate treatment. In such case, a Title VII violation can be established without a showing of discriminatory motive. *See* note 9. A violation of § 1981, however, cannot be premised on this theory alone. *General Building Contractors Assoc. v. Pennsylvania*, 1982, ___ U.S. ___, ___ — ___ & n. 8, 102 S.Ct. 3141, 3146 & n. 8, 73 L.Ed.2d 835, 844-45 & n. 8. We thus have serious doubt that exoneration of a defendant under § 1981 would be inconsistent with liability of the same defendant or his principal under Title VII on a disparate impact theory.

Savings and Loan Association, 5 Cir.1975, 509 F.2d 140, 143-44. Specifically, the court found that President Jackson had removed Dr. Lincoln from teaching responsibilities during the 1977-78 term in the hope that she would not seek continued employment, that her assignment during that term consisted of insignificant tasks that had no relation to her training or experience, and that he put her future in the hands of Dr. Hall, who, as he knew, considered Dr. Lincoln a threat to the "integrity of the institution". Accordingly, the district court concluded that Dr. Lincoln's failure to complete a renewal application "resulted from her reasonable belief that she had in effect been rejected already".

Alternatively, the district court found that even to the extent Dr. Hall may have been ultimately responsible for Dr. Lincoln's nonrenewal, he was acting under guidelines established by President Jackson. Regardless of who had the opportunity to offer Dr. Lincoln a new contract, the court found that it would not have been renewed because of her inability to fulfill President Jackson's requirements. The court found no evidence that Dr. Lincoln had generated enough funding to pay her salary for another year, and Dr. Hall's stated reason for not offering her a new contract was her failure to demonstrate that she had.[7] The district court thus found that on either rationale Dr. Lincoln was not renewed "as a direct consequence of steps taken by Dr. Jackson". The court held the Board of Regents "clearly accountable for these actions under the doctrine of *respondeat superior*".[8]

[7] Specifically, Dr. Hall testified as follows: "Since I did not receive a reply from her concerning what she had done, and I had made the request in order to carry out the mandate of Dr. Jackson, I did not offer her a contract for the next year." Trial Transcript (Tr.) 298.

[8] As our discussion in Part III will elaborate, the district court's disposition of the case rested to some extent on findings that Mrs.

The district court's reasoning not only harmonizes its judgment with the verdict on the § 1981 claim but also establishes that the jury's advisory verdict was consistent with that verdict. We may thus easily dispose of Dr. Lincoln's cross-appeal. Dr. Lincoln argues that the jury's overall resolution of the case was inconsistent and requires that the verdict on the § 1981 claim be set aside. Because we do not find that the jury acted inconsistently, we need not decide whether a separate, nonbinding advisory verdict can render inconsistent and void the jury's resolution of a case committed to it for binding determination.

Although the advisory verdict and the judgment on the Title VII claim are not inconsistent as a matter of law with the verdict on the § 1981 claim, our inquiry does not end with this conclusion. The apparent consistency would evaporate if the evidence did not support the critical finding that President Jackson constructively discharged Dr. Lincoln. We must therefore consider the sufficiency of the evidence on this point. We do so in the course of our general review of the evidence on the Title VII claim.

Terrell and Dr. Hall were racially biased against Dr. Lincoln. A finding that these defendants possessed some racial animus, however, is not necessarily inconsistent with the judgment in their favor in the § 1981 action. The jury may have absolved them from liability on the ground that their role was not determinative in the challenged employment decision or that their opposition to Dr. Lincoln, whether misguided or not, was not motivated by any *conscious* racial animus. As the district court instructed the jury on the § 1981 claim, "purposeful racial discrimination" means "conduct or policies which would result in racial discrimination directed against the plaintiff, where the purpose or intent of that conduct or policy is to be racially discriminatory". The judgment for the plaintiff on the Title VII claim rested on President Jackson's awareness of the racial component in Dr. Hall's and Mrs. Terrell's objections to Dr. Lincoln, not on their own awareness of that component. *See* p. 20.

III. Sufficiency of the Evidence

[8-14] The tripartite division of the burdens assigned to the parties in a Title VII case was first articulated in *McDonnell Douglas Corp. v. Green*, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668, and most recently clarified by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 1981, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207. A plaintiff alleging disparate treatment in an action under Title VII has the burden of persuading the trier of fact that the defendant has committed intentional discrimination.[9] *Id.* at 253, 101 S.Ct. at 1093, 67 L.Ed.2d at 215; *Pouncy v. Prudential Insurance Co. of America*, 5 Cir.1982, 668 F.2d 795, 799. Although this ultimate burden remains with the plaintiff at all times, the plaintiff may, by proving a *prima facie* case of disparate treatment, shift to the defendant the burden of producing evidence of nondiscriminatory intent. *Burdine*, 450 U.S. at 252-56, 101 S.Ct. at 1093-95, 67 L.Ed.2d at 215-17. To make a *prima facie* case, the plaintiff must establish the four familiar elements required by *McDonnell Douglas:*

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection,

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[9] The burden of the plaintiff in a disparate treatment case differs from that in a case involving a claim predicated on disparate impact. Disparate impact cases involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory." *International Bhd. of Teamsters v. United States*, 1977, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1845 n. 15, 52 L.Ed.2d 396, 415 (citation omitted). *See also Burdine*, 450 U.S. at 252, n. 5, 101 S.Ct. at 1093 n. 5, 67 L.Ed.2d at 215.

> the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802, 93 S.Ct. at 1817, 36 L.Ed.2d at 677; *see also Harrell v. Northern Electric Co.*, 5 Cir.1982, 672 F.2d 444, 449, *modified and reh. denied*, 679 F.2d 31. The specific proof required for a *prima facie* case will naturally vary from case to case. *See McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1817, 36 L.Ed.2d at 677. *McDonnell Douglas* was a hiring case, but variants of its four factors apply in the context of wrongful discharge or nonrenewal as well. *McDonald v. Santa Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493; *Whiting v. Jackson State University*, 5 Cir.1980, 616 F.2d 116, 120. In such a case, the plaintiff can make a *prima facie* case by establishing that he is a member of a minority, that he was qualified for his job, that he was discharged, and that he was replaced by a member of the majority race. *Whiting*, 616 F.2d at 121; *Marks v. Prattco*, 5 Cir.1979, 607 F.2d 1153, 1155. To make a *prima facie* case, the plaintiff must prove these elements by a preponderance of the evidence.[10] *Burdine*, 450 U.S. at 252-53, 101 S.Ct. 1093-94, 36 L.Ed.2d at 215.

[15-17] A *prima facie* case establishes a presumption of discrimination and shifts the analysis to the second of its three steps, in which the burden of rebutting the presumption falls to the defendant. *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at 216. The defendant must "articulate some legitimate, nondiscriminatory reason"

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[10] As used in this context, "prima facie case", of course, denotes "establishment of a legally mandatory, rebuttable presumption", not, as it often does, the burden of producing "enough evidence to permit the trier of fact to infer the fact at issue". *Burdine*, 450 U.S. at 254 n. 7, 101 S.Ct. at 1094 n. 7, 67 L.Ed.2d at 216.

for the allegedly discriminatory action. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1817, 36 L.Ed.2d at 677. What *Burdine* clarified, and what was unclear before, is that the defendant's burden at this point is one of production, not persuasion. The defendant need not persuade the court that it was motivated by nondiscriminatory considerations, nor need it establish by a preponderance of the evidence that such reasons exist. *Burdine*, 450 U.S. at 254, 257-58, 101 S.Ct. at 1094, 1096, 67 L.Ed.2d at 216, 218. The defendant's evidence is sufficient if it "raises a genuine issue of fact as to whether it discriminated against the plaintiff". *Id.* at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at 216. The defendant must raise an issue of fact by means of admissible evidence, however, and averments in pleadings are insufficient. *Id.* at 255 & n. 9, 101 S.Ct. at 1094, & n. 9, 67 L.Ed.2d 216. In addition, the reasons articulated must be "legally sufficient to justify a judgment for the defendant". *Id.*[11]

[18] If the defendant fails to produce sufficient evidence to raise a genuine issue of fact, then the plaintiff will prevail without any further showing. *Id.* at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at 216. If the defendant does succeed in rebutting the presumption of discrimination, however, the third step in the analysis is required: the burden shifts back to the plaintiff, who must establish by a preponderance of the evidence that the reasons proffered by the defendant are pretextual, not the true reasons for the challenged employment decision. *Id.* at 256, 101 S.Ct. at 1095, 67 L.Ed.2d at 217. He may prove this either by means of affirmative evidence that race played an imper-

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[11] For a detailed analysis anticipating the holding in *Burdine* and tying it to Fed.R.Evid. 301, see Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 Stan.L.Rev. 1129 (1980).

missible role in the decision or by showing that the proffered nondiscriminatory reasons do not merit credence. *Id.*

[19] A plaintiff's burden at this point is equivalent to Dr. Lincoln's overarching burden in the case, that of persuading the court that she is a victim of intentional discrimination. *Id.* In discharging this burden, the plaintiff need not prove that race was the only motive behind the challenged action. *Pittman v. Hattiesburg Municipal Separate School District*, 5 Cir.1981, 644 F.2d 1071, 1076; *see also Turner v. Texas Instruments, Inc.*, 5 Cir.1977, 555 F.2d 1251, 1257. She must prove, however, that race was a *significant* factor in the defendant's decision. *Whiting v. Jackson State University*, 5 Cir.1980, 616 F.2d 116, 121. She will thus prevail on a showing that, although legitimate grounds for the defendant's action existed, the action would not have undertaken "but for" her race. *McDonald v. Santa Fe Trail Transportation Co.*, 1976, 427 U.S. 273, 282 n. 10, 96 S.Ct. 2574, 2580 n. 10, 49 L.Ed.2d 493, 502; *see also Jackson v. City of Killeen*, 5 Cir.1981, 654 F.2d 1181, 1186.[12]

The district court in the present case found that Dr. Lincoln's contract would have been renewed but for her race. The court noted that the plaintiff bears the ultimate burden of proving racial discrimination and acknowledged both that Dr. Lincoln was not a "perfect teacher or a

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[12] For a recent criticism of the "but for" standard of causation in disparate treatment cases, see Brodin, The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective, 82 Colum.L.Rev. 290 (1982). Professor Brodin suggests that a Title VII violation should be established on a showing that race was a motivating factor in the challenged employment decision, regardless of whether the same decision would have been reached had race not been considered, and that the question of "but for" causation should affect only remedies. *Id.* at 311-26.

perfect colleague" and that none of the parties was necessarily "overtly or intentionally racist". But the court found that racial animus was apparent in several respects and concluded from the evidence before it that Dr. Lincoln was denied renewal "not because she was incompetent but because she was white". In reaching this conclusion, of course, the court applied the tripartite analysis of *McDonnell Douglas*.

The district court first found that Dr. Lincoln had made a *prima facie* case. She was in a racial minority at Savannah State, where blacks outnumbered whites approximately two-to-one both on the faculty and in the student body. She was constructively discharged by President Jackson, as we discussed in Part I. The court also found that Dr. Lincoln was qualified for her job, at least in the view of President Jackson, whom it held responsible for her discharge, and that her position was subsequently filled with a black, either Dr. Sara Harper, who joined the department when Dr. Lincoln was assigned to nonteaching responsibilities, or Ms. Diana Wagner, who was originally hired on a temporary basis and would have been terminated if Dr. Lincoln had continued to teach.

[**20, 21**] The district court then considered and rejected the Board's effort to rebut the presumption of discrimination. The Board introduced evidence that Dr. Lincoln's nonrenewal was motivated by charges of incompetence and lack of rapport with students. Having established that President Jackson was responsible for Dr. Lincoln's constructive nonrenewal, however, the district court found this evidence to lack credibility because President Jackson himself had testified that he found those charges baseless.[13] The district court found "persuasive evidence

[13] The district court apparently held the defendant to too stringent a burden of proof in rejecting its rebuttal evidence. It decided the

that race was the predominant factor". Specifically, the court found that Dr. Hall had separated racial charges from the alleged academic deficiencies early in the review process and that President Jackson had rejected the pure academic allegations. It also found that race was "a significant factor in the initial impression of [Dr. Lincoln] which developed in the Home Economics Department", "the basis for efforts to develop faculty sentiment against

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case before the Supreme Court decided *Burdine*, when in this Circuit a defendant was still required to prove nondiscriminatory motive by a preponderance of the evidence to rebut a *prima facie* case, *see Burdine v. Texas Dep't of Community Affairs*, 5 Cir.1979, 608 F.2d 563, *vacated*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207. The district court stated that "Defendant has failed to show that these nonracial considerations in fact contributed to the decisions" that led to Dr. Lincoln's departure, and this language suggests a failure to carry the burden of persuasion.

The "clearly erroneous" standard under which we review the district court's factual findings, *see* pp. 16-17, does not insulate factual findings influenced by legal error. *Johnson v. Uncle Ben's, Inc.*, 5 Cir. 1980, 628 F.2d 419, 422, *vacated on other grounds*, 1981, 451 U.S. 902, 101 S.Ct. 1967, 68 L.Ed.2d 290; 5A J. Moore & J. Lucas, Moore's Federal Practice § 52.03[2] at 2664 (2d ed. 1982). If the district court relied on an erroneous view of a Title VII defendant's burden in finding that it has not rebutted a *prima facie* case, that finding is not binding on the Court of Appeals. *Turner v. Texas Instruments, Inc.*, 5 Cir.1977, 555 F.2d 1251, 1256. We need not depart from the "clearly erroneous" standard, however, if application of the wrong legal standard did not "taint or infect" the district court's factual findings. *See Smith v. United States*, 5 Cir.1974, 502 F.2d 512, 519. Thus, if the district court's resolution of the case did not depend on the defendant's inability to rebut under an incorrect standard, as it did in *Turner*, but relied instead on the plaintiff's success with her ultimate burden of proving discrimination by a preponderance of the evidence, and if the "progression of factual findings and legal conclusions indicates that the district court found by a preponderance of the evidence" that the defendant's rebuttal was "unworthy of credence", then the court's findings "are fully consistent with *Burdine*". *Ford Motor Co. v. EEOC*, 1982, ___ U.S. ___, ___ n. 7, 102 S.Ct. 3057, 3062 n. 7, 73 L.Ed.2d 721, 728 n. 7.

The district court expressly held the plaintiff to "the ultimate burden of proof with respect to her claim of facial discrimination".

her thereafter", and "the focus of student unrest which was created thereafter". According to the district court, the student petition was a "major force" in the decisions leading to Dr. Lincoln's termination. The court concluded that because of her race, Dr. Lincoln's failings were treated more harshly than similar failings in a black teacher would have been and that her contract would have been renewed but for the fact that she is white.

[**22-24**] We may not set aside the district court's findings of fact unless they are clearly erroneous. Fed.R.Civ.P. 52(a); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2585 (1971). This deferential standard of review imposes an especially heavy burden on the appellant in a case such as this, in which the evidence was largely testimonial, and the district court had the advantage of observing the witnesses and evaluating their credibility firsthand. *See Edwards v. Gladewater Independent School District*, 5 Cir.1978, 572 F.2d 496, 497 (per curiam); *Galena Oaks Corp. v. Scofield*, 5 Cir.1954, 218 F.2d 217, 219. Our deference to the district court is not unlimited, however, and we will hold a finding of fact clearly erroneous if the record lacks substantial evidence to support it. *See Ward v. Hobart Manufacturing Co.*, 5 Cir.1971, 450 F.2d 1176, 1182-84. Even if substantial evidence supports a finding, we must consider the evidence as a whole and set it aside if we are "left with the impression it is not the truth and right of the case". *W.R.B. Corporation v.*

Moreover, as the discussion in the text illustrates, the court's Findings of Fact and Conclusion of Law clearly demonstrate that it found the plaintiff had ultimately carried her burden of proving by a preponderance of the evidence that the defendant's rebuttal lacked credence, regardless of the standard initially applied in evaluating the rebuttal. We are thus bound by the district court's finding that Dr. Lincoln's contract would have been renewed but for her race, unless that finding is clearly erroneous.

Geer, 5 Cir.1963, 313 F.2d 750, 753, *cert. denied*, 1964, 379 U.S. 841, 85 S.Ct. 78, 13 L.Ed.2d 47. Still, "[a] finding is clearly erroneous and reversible under Rule 52(a) only when 'the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' ". *Williamson v. Brown*, 5 Cir.1981, 646 F.2d 196, 200 (per curiam) (quoting *United States v. United States Gypsum Co.*, 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746).

This Court has held, in a long line of cases, that the "clearly erroneous" standard insulates only findings of "subsidiary fact", and that the determination whether impermissible intentional discrimination has occurred in a Title VII case is one of "ultimate fact", which we "may reverse free of the clearly erroneous rule". *Causey v. Ford Motor Co.*, 5 Cir.1975, 516 F.2d 416, 421 (quoting *Industrial Instrument Corp. v. Foxboro Co.*, 5 Cir.1962, 307 F.2d 783, 786 n. 2).[14] The Supreme Court, however, has

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[14] *See also, e.g.*, cases cited in *Pullman-Standard v. Swint*, 1982, ___ U.S. ___, ___, n. 15, 102 S.Ct. 1781, 1788, 72 L.Ed.2d 66, 78; *Williams v. New Orleans S.S. Ass'n*, 5 Cir.1982, 673 F.2d 742, 746; *Harrell v. Northern Elec. Co.*, 5 Cir.1982, 672 F.2d 444, 445-46; *De Anda v. St. Joseph Hosp.*, 5 Cir.1982, 671 F.2d 850, 855; *Pouncey v. Prudential Ins. Co. of America*, 5 Cir.1982, 668 F.2d 795, 798; *Wright v. Western Elec. Co.*, 5 Cir.1981, 664 F.2d 959, 963; *Robbins v. White-Wilson Medical Clinic, Inc.*, 5 Cir.1981, 660 F.2d 1064, 1068, *vacated*, 1982, ___ U.S. ___, 102 S.Ct. 2229, 72 L.Ed.2d 842; *Sanchez v. Texas Comm'n on Alcoholism*, 5 Cir.1981, 660 F.2d 658, 661; *Markey v. Tenneco Oil Co.*, 5 Cir.1981, 635 F.2d 497, 498; *Hester v. Southern Ry.*, 5 Cir.1974, 497 F.2d 1374, 1381; *Bolton v. Murray Envelope Corp.*, 5 Cir.1974, 493 F.2d 191, 194; *United States v. Jacksonville Terminal Co.*, 5 Cir.1971, 451 F.2d 418, 423-24, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

The distinction between subsidiary and ultimate facts for purposes of appellate review in this Circuit did not originate in the Title VII context and goes back at least a decade before the enactment of Title VII. In *Galena Oaks Corp. v. Scofield*, 5 Cir.1954, 218 F.2d 217, the question of ultimate fact was whether gain derived from the sale of

recently rejected this view, and it is now the law that this Court may reverse a finding of intentional discrimination only if the finding is clearly erroneous. *Pullman-Standard v. Swint*, 1982, ____ U.S. ____, ____, 102 S.Ct. 1781, 1788-91, 72 L.Ed.2d 66, 78-81; *see also Mitchell v. M.D. Anderson Hospital*, 5 Cir.1982, 679 F.2d 88. Accordingly, we will reject the district court's finding that Dr. Lincoln's contract would have been renewed but for her race, only if we find it clearly erroneous.[15] We hold that it was not clearly erroneous.[16]

[25] We first note that the district court committed no clear error in finding that President Jackson was responsible for Dr. Lincoln's constructive discharge.[17] The dis-

houses was ordinary income or capital gain. The court reasoned that questions of ultimate fact are akin to mixed questions of fact and law, stating that findings of ultimate fact are "simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts". *Id.* at 219.

[15] The Supreme Court in *Pullman-Standard* expressly left open the question whether "clearly erroneous" review under Fed.R.Civ.P. 52(a) applies to genuine mixed questions of law and fact, "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated". ____ U.S. at ____ n. 19, 102 S.Ct. at 1790, 72 L.Ed.2d at 80. The case before us presents no such question, since the district court's finding that Dr. Lincoln's contract would have been renewed "but for her race", if correct, would clearly justify relief under Title VII, *McDonald v. Santa Fe Trail Transp. Co.*, 1976, 427 U.S. 273, 282 n. 10, 96 S.Ct. 2574, 2580 n. 10, 49 L.Ed.2d 493, 502. We thus review this finding only to determine whether it was clearly erroneous.

[16] The Board of Regents argues that concerns peculiar to the University setting, particularly the need for academic freedom in faculty employment decisions, warrant some judicial deference to the nondiscriminatory reasons proffered for an employment decision and, by implication, more searching appellate review of a district court decision rejecting such reasons. This argument is without merit. *Whiting v. Jackson State University*, 5 Cir.1980, 616 F.2d 116, 121.

[17] The Board of Regents does not attack this finding. Rather, the Board misconstrues the district court's order to rely on the premise

trict court relied on uncontradicted testimony that President Jackson had removed Dr. Lincoln from teaching responsibilities and assigned her to duties not commensurate with her professional experience or training. It is also undisputed that President Jackson did this in the hope that she would resign and that he established the standard that would require Dr. Lincoln's ultimate dismissal if she failed to generate her own salary with outside funding. Finally, it is undisputed that President

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that Dr. Hall was responsible for Dr. Lincoln's nonrenewal. We consider the sufficiency of the evidence supporting this finding, however, because it is critical to our conclusion, discussed in Part I, that the judgment on the Title VII claim was not inconsistent with the jury verdict on the § 1981 claim.

The Board's misinterpretation of the district court's factual findings seems to derive from the assumption that Dr. Lincoln's complaint alleged only the actions of Dr. Hall and Mrs. Terrell as grounds for holding the Board of Regents liable and did not ask the court to find that President Jackson had discriminated against her. We need not consider whether the district court must limit its factual findings to theories of recovery advanced by the plaintiff, because in this case we believe the Board has interpreted Dr. Lincoln's theory of recovery too narrowly. Although her Original Complaint accused the Board of discrimination "through its agents, Defendants CLYDE W. HALL, EVANEL TERRELL, and DIANA WAGNER", it also alleged generally that she was discharged "so as to provide a vacancy that was filled with a Black Female" and "because she was white, and for reasons for which Blacks are not terminated". These allegations directly relating to the termination itself did not mention the named defendants as agents or otherwise. Moreover, in the amended complaint, the Board of Regents was eliminated from the first-quoted allegation, which then included *only* the individual defendants. At this point, the Board's liability could be predicated only on the more general allegations that followed. In addition, the plaintiff's proposed jury charge on the Title VII claim referred to the Board "acting through its employees at Savannah State College" without specifying the individual defendants as the employees in question. The district court's instructions to the jury were equally general. The Board of Regents does not argue that the exclusion of President Jackson as a named defendant precludes the district court from holding it liable for his actions, and we see no reason to hold that *respondeat superior* is inoperative in Title VII cases unless the agent is made a party.

Jackson knew that Dr. Hall would approach the task of reviewing Dr. Lincoln's performance with unfavorable preconceptions about her abilities. This evidence, against the background of Dr. Lincoln's career at Savannah State, supports the district court's finding that President Jackson made continued employment at Savannah State so unattractive to Dr. Lincoln that he caused her not to apply for a new contract.

The Board of Regents attacks both the district court's finding that Dr. Lincoln established a *prima facie* case and its rejection of the nondiscriminatory reasons articulated for the treatment accorded her. Concerning the *prima facie* case, the Board addresses only two of the *McDonnell Douglas* factors. It does not dispute that Dr. Lincoln was in a racial minority at Savannah State, nor that it failed to re-employ her. The Board argues, however, that Dr. Lincoln was not replaced by a black, because Sara Harper, her alleged replacement, had been employed throughout Dr. Lincoln's last year, when the department had five members rather than the customary four. The Board also argues that Dr. Lincoln was not qualified for the position she was ultimately denied, by virtue of her own admissions that she lacked credibility and rapport with the majority of her students, Trial Transcript (Tr.) 91-92.

In finding that Dr. Lincoln was replaced by a black, the district court relied on President Jackson's testimony that the home economics department would sustain only four faculty members, *id.* at 136,[18] that the search for a

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[18] This testimony, of course, directly contradicts the Board's critical assertion that during Dr. Lincoln's last year, the department had five members. Although it is possible that Dr. Lincoln was nominally a member of the Department during 1977-78, however, it is established that she performed no duties within the de-

new department head after Mrs. Terrell's retirement in 1976 would eventually displace the acting head and require the termination of one of the other three faculty members, *id.* at 135, and that when Dr. Lincoln was transferred to the Dean's Office, Dr. Sara Harper, who is black, moved into "Dr. Lincoln's slot", *id.* This testimony supports the finding that Dr. Lincoln was replaced by a black, and in the absence of conflicting testimony, we cannot hold that finding clearly erroneous.

The district court based its finding that Dr. Lincoln was qualified to teach at Savannah State on President Jackson's testimony that he considered the case against her weak, *id.* at 143, that he found her "as competent as anybody we have out there," *id.* at 138, and that she had displayed concern for students "beyond the ordinary call", *id.* Although there is considerable evidence in the record that Dr. Lincoln lacked a good rapport with her students and was deficient in other significant ways, this evidence would not justify our declaring clearly erroneous the trial court's choice to credit President Jackson's testimony. This is particularly so because that testimony is bolstered both by Dr. Lincoln's impressive credentials, *see* p. 3, and by the testimony of three students whose names appear on the petition, that Dr. Lincoln was either "just like any other teacher", Tr. 98, 101, or otherwise not as bad as the petition alleged, *id.* at 113.

In finding that the Board's asserted reasons for nonrenewal of Dr. Lincoln's contract lacked credibility, the district court, as noted above, *see* p. 15, relied both on

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partment, and there is no evidence that the home economics budget could support five faculty members for more than one year, when unusual circumstances required it. In any case, President Jackson's testimony is not so inherently incredible that we can hold the district court clearly erroneous for choosing to credit it.

Dr. Jackson's own testimony that he found the allegations concerning her academic deficiencies to lack merit and on findings that the student petition and faculty sentiment against Dr. Lincoln, which contributed to her constructive discharge, were influenced by racial considerations. These findings in turn rested on language in the petition itself,[19] evidence that members of the faculty participated in preparing and circulating the petition,[20]

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[19] The student petition consisted of four typewritten, single-spaced pages, alleging numerous failings of Dr. Lincoln as a teacher. The substantive allegations followed three introductory paragraphs, the second of which read:

> As a group, *we feel that she is not interested in teaching us and feels superior to Black students and Black institutions.* In Spring Quarter 1976, Dr. Lincoln complained to Mrs. Lumpkin that she had come all the way down here from Lansing, Michigan, to help "you people" and her services were not appreciated. The "you people" complaint was mentioned again during Fall Quarter 1976 after Dr. Hall had observed her teaching and held a conference. *This type of attitude is insulting. Other racists have been removed from Savannah State College.* She constantly belittles the Department's physical plant and its equipment. In Summer Quarter 1975 when she was forced to take inventory, she stated that the inventory was not worth taking and all the equipment should be thrown in the marsh.

Plaintiff's Exhibit No. 2 (emphasis added). The district court found that the "direct and clear appeal" of the petition was racial. Record (R.) 171. As the Board of Regents points out, a petition alleging that a teacher is a racist does not on its face purport to call for her removal because she is white. There is considerable evidence, however, that Dr. Lincoln possessed no racial prejudice, *e.g.*, Tr. 107, 126, and that some signers of the petition did not believe she was a racist, *e.g. id.* at 113. The district court may thus reasonably have inferred that a deeper significance rested in the allegations of racism.

[20] Mrs. Terrell testified that, although she was retired at the time, she was in communication with the students preparing the petition, Tr. 173, and "gave support" for its signing, *id.* at 172. Martha Corley, who is black and a member of the home economics faculty, testified that the language of the petition was not likely that of students, *id.* at 108, although Professor Milledge, a teach of English who chaired the first committee that reviewed Dr. Lincoln's status, testified to the contrary, *id.* at 207-08. Dr. Jackson testified that students who signed the petition told him they had left class one-by-one to sign it in a teacher's office. *Id.* at 326. One student, a black, told him that a

and evidence that faculty members, particularly Mrs. Terrell and Dr. Hall, possessed racial animus. The district court credited testimony that Mrs. Terrell had referred to Dr. Lincoln as "this white lady [who] came down here thinking she was going to get some easy retirement", Record (R.) 169 (quoting Tr. 129), that Dr. Hall had told another black faculty member that he "hate[d] white people", *id.* at 170 (quoting Tr. 104), and that the latter considered race an "important consideration" in choosing a department head, *id.* at 178 n. 7 (quoting Tr. 133). This evidence, combined with President Jackson's testimony that Dr. Lincoln was no worse than most teachers at Savannah State, supports the finding that racial concerns played a role in both faculty and student dissatisfaction with Dr. Lincoln. The Board of Regents, on appeal, seeks to discredit the evidence of faculty involvement in the student petition and racial bias on the part of faculty members.[21] But it can point to no testimony in the record

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black teacher had held up one of her grades because she had not signed the petition, *id.*, and another student told him she signed it because "she wanted to graduate" and "wasn't going to take any chances", *id.* at 327. President Jackson considered it "obvious" that the purported student leader had not drafted the petition. *Id.*

In addition to this evidence, it is relevant that the first substantive allegation in the petition concerned a dispute between Dr. Lincoln and Mrs. Terrell, rather than any dissatisfaction with Dr. Lincoln's classroom performance, *see* note 5. It is not readily apparent how this incident came to the attention of the students. Nor is it apparent how the dispute concerning inventory, referred to in the portion of the petition quoted in note 19, came to their attention. Mrs. Terrell testified that she did not inform them of it. Tr. 184. Finally, the petition included language that Mrs. Terrell had used in referring to Dr. Lincoln, such as "anarchy", and other terminology that witnesses associated with Mrs. Terrell, *e.g.*, *id.* at 109.

[21] Much of the appellant's argument consists of an effort to establish that Dr. Hall acted out of no racial animus when he chose not to offer Dr. Lincoln a fifth contract. The district court, however, did not find that Dr. Hall was so motivated at the time and did not consider the question. The court's finding that President Jackson was

contradicting the evidence of faculty involvement and no testimony, apart from the denials of Mrs. Terrell and Dr. Hall, *see* Tr. 176, 256, that they die not make the statements attributed to them.[22] We cannot hold the district court clearly erroneous for choosing to believe disinterested witnesses rather than parties to the action.

[**26**] The evidence in this case, as the district court described it, was "often contradictory, confused, and at points quite sketchy". R. 183. The district court found intentional discrimination but was "unwilling to conclude . . . that any of the parties were necessarily overtly or intentionally racist". *Id.* It held President Jackson responsible for Dr. Lincoln's constructive discharge, yet it did not find that he possessed any racial bias. Intentional discrimination, however, is possible without racial bias as such.[23] The district court found that race imper-

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responsible for Dr. Lincoln's constructive nonrenewal made inquiry into Dr. Hall's motives irrelevant. *See* pp. 10-11 & 17 note 17. Our task is thus only to determine whether the district court clearly erred in finding that race played an impermissible role in President Jackson's actions.

[22] According to Dr. Lincoln, Mrs. Terrell had also stated on many occasions that "Dr. Anthony is really one of us. . . . [H]er sister's skin is almost as dark as mine." *Id.* at 28. (Dr. Anthony is of Lebanese extraction. *Id.*) Mrs. Terrell denied making this comment as well. *Id.* at 177.

[23] *See Robbins v. White-Wilson Medical Clinic, Inc.*, 5 Cir.1981, 660 F.2d 1064, *vacated and remanded*, 1982, ___ U.S. ___, 102 S.Ct. 2229, 72 L.Ed.2d 842. In *Robbins*, this Court upheld as not clearly erroneous the district court's finding that the individual alleged to have discriminated "possessed no racial bias or animus as such". The Court reversed, however, the district court's "ultimate" finding that no intentional discrimination had occurred. *See* pp. 1560-1561. The Supreme Court remanded the case for further consideration in the light of *Pullman-Standard, Inc. v. Swint*, 1982, 456 U.S. ___, 102 S.Ct. 1781, 72 L.Ed.2d 66, and on remand, this Court upheld, under "clearly erroneous" review, the district court's finding that no intentional discrimination had occurred, *Robbins v. White-Wilson Medical Clinic, Inc.*, 5 Cir.1982, 682 F.2d 503, 504.

missibly influenced the faculty and student actions prompting President Jackson to put Dr. Lincoln in such a position that she would not seek a fifth contract. The evidence also supports the finding that President Jackson, particularly in view of his own assessment of Dr. Lincoln's abilties, was aware that race was a determinative factor in those faculty and student actions, whether or not those calling for her ouster were "overtly or intentionally racist". In acting on charges he knew to be racially motivated, President Jackson intentionally discriminated. The district court found from the evidence that Dr. Lincoln would have sought and received a new contract, but for her race. We cannot say we are "left with a definite and firm conviction that a mistake has been committed", *United States v. United States Gypsum Co.*, 1948, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766.[24]

CONCLUSION

The judgment for the plaintiff on her Title VII claim against the Board of Regents is neither inconsistent with the jury verdict on the § 1981 claim nor clearly erroneous on the basis of evidence before the district court. The jury verdict was not inconsistent, and there is no reason to set it aside. Accordingly, the judgment of the district court is in all respects AFFIRMED.

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[24] We note that the jury, charged with returning an advisory verdict, apparently reached the same conclusion. Although the advisory verdict is not strictly relevant to our review of this case, and does not influence our decision, we consider the point worth mentioning. As we have discussed earlier, the advisory verdict is not impeached by any purported inconsistency with the verdict exonerating Mrs. Terrell and Dr. Hall. *See* p. 11.

HATCHETT, Circuit Judge, dissenting:

I dissent for two reasons: (1) the majority, in effect, overrules *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); and (2) the trial court and majority select as a discriminatory act one time-barred by statute, which ousts both courts of jurisdiction.

The majority opinion finds liability against the Board of Regents following the theory advanced by the district court that Dr. Jackson, "whose liability the jury in the § 1981 action never considered, was in fact responsible for Dr. Lincoln's departure from Savannah State." On this theory, the majority emasculates the holding in *Dairy Queen*. Although the majority correctly recognizes that when legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both, its holding provides a rationale by which the rule of *Dairy Queen* may be avoided.

The rule announced today instructs plaintiffs in jointly instituted Title VII and § 1981 actions, that *Dairy Queen* may be avoided by simply failing to name one of the agent defendants is the § 1981 suit. If the agent defendant is not named in the § 1981 action, the trial judge is free to find facts as to the unnamed agent and thereby render the principal liable in the Title VII action. Additionally, under the majority's holding, the principal may be found liable based on acts of the unnamed agent without any notice to the principal that the unnamed agent's actions are suspect. The judge in this case was bound by the jury's determination that *no named agent of the Board of Regents was guilty of a discriminatory practice.*

Dr. Lincoln's complaint names as party defendants the Board of Regents, Dr. Hall, Mrs. Terrell, and Ms. Wagner. Nowhere in the complaint was liability sought

to be inposed on the Board for the acts of Dr. Jackson. In spite of this, the trial court and majority here impose liability on the Board on the basis of acts performed by an agent of the Board not named in the lawsuit and not defended at trial. This is precisely the sort of mischief *Dairy Queen* intended to curb. Moreover, if the discriminatory act that renders the Board liable is that of Dr. Jackson, then no jurisdiction existed in the district court. Title VII requires aggrieved persons to file a complaint with the EEOC within 180 days after the alleged unlawful employment practice occurs. 42 U.S.C.A. § 2000e-5(e). On April 1, 1977, Dr. Jackson notified Dr. Lincoln by memo that she was being terminated for cause. A formal letter to Dr. Lincoln on April 25, 1977, informed her of this course of action. On June 1, 1977, another letter from Dr. Jackson informed Dr. Lincoln of the reasons for her termination. Because the April 25, 1977, date is by law the date on which the alleged unlawful employment practice occurred, Dr. Lincoln should have notified the EEOC by October 22, 1977, to come within the 180 day limitation. There is nothing in the record to indicate that an EEOC complaint was filed within 180 days of Dr. Jackson's alleged discriminatory employment practice. A good reason exists for the absence in the record; no one, other than the judges in this case, ever considered Dr. Jackson's actions as the acts giving rise to this lawsuit.

DECISION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

H. ANITA LINCOLN
Plaintiff

V.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and CLYDE W. HALL, and EVANEL R. TERRELL
Defendants

CV479-340

ORDER

This case was brought before the Court pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Plaintiff's complaint as amended alleged that she had been refused a contract of employment as a non-tenured professor of Home Economics at Savannah State College (SSC) on the basis of her race. Plaintiff is white. SSC is a predominantly and historically black institution. More specifically, Dr. Lincoln alleged that she had been the victim of racially-motivated attacks on her fitness as an instructor, directly or indirectly carried out by individual defendants Dr. Clyde W. Hall and Mrs. Evanel R. Terrell in violation of §1981. Plaintiff also alleged that the defendant Board of Regents was liable under Title VII for her nonrenewal.

A trial of these issues was held before a jury November 3-4, 1980. This jury found for the individual defendants

in the §1981 action. However, by an advisory verdict, the jury found for the plaintiff with respect to the Title VII claim. After a full and independent review of the evidence presented at this trial, it is the conclusion of the Court that impermissible racial animus was a substantial factor in plaintiff's losing her position, such that "but for" her race she would not have been dropped from the SSC faculty. Accordingly, the Court will order backpay and other relief to the plaintiff as outlined below. The bases for these remedies are described in the following determinations styled "Findings of Fact" (FF) and "Conclusions of Law" (CL). However, should the content of any item be at odds with the category assigned, content shall be controlling.

Findings of Fact

The Participants

1. The defendant Board of Regents of the University System of Georgia is the body overseeing operations of constituent units of the state system of public higher education, including SSC. As such, the defendant Board directly and through its agents controls decisions with respect to hiring and retention of faculty members at these institutions.

2. The individual named defendants Dr. Clyde W. Hall and Mrs. Evanel R. Terrell, both of whom are black, were employed on the faculty at SSC during some or all of the period here at issue. Dr. Hall was head of the SSC Division of Technical Sciences, which included Home Economics, from 1961 until 1976, and again from 1977 until March, 1978. Dr. Hall was Acting President of SSC from March, 1978 until August, 1980. As Division Chairman, he recommended plaintiff's initial employment in

August, 1974. He also participated directly in the division to remove Dr. Lincoln from her teaching responsibilities in the spring of 1977. As Acting President of SSC, Dr. Hall had charge of plaintiff's last renewal application in the summer of 1978.

Mrs. Terrell was chairman of the SSC Department of Home Economics from Fall, 1947 until her retirement in June, 1976. Mrs. Terrell personally recommended plaintiff's appointment to the SSC faculty in August, 1974. Thereafter, she also initiated several complaints to Dr. Hall concerning plaintiff's performance and took other action directed toward securing plaintiff's dismissal.

3. The Home Economics faculty at SSC also included Ms. Diana Wagner, who is black, as an assistant professor. Ms. Wagner was dropped as an individual defendant in the §1981 action shortly prior to trial.

Dr. Teresa Anthony, who is white, was a third member of the Home Economics faculty during the period at issue. Like Mr. Wagner, she took an active role in seeking plaintiff's dismissal, particularly in spring, 1977, when she was acting department head.

Mrs. Terrell, Ms. Wagner and Dr. Anthony were the only teachers in the Home Economics Department when Dr. Lincoln arrived at SSC. Subsequently, two other persons joined the department, Ms. Martha Corley who returned from a leave of absence in September, 1976, and Dr. Sarah Harper, who was retained to replace Mrs. Terrell as department chairman beginning in September, 1977. Dr. Harper took no part in the trial. Ms. Corley's testimony was regarded as particularly significant by the Court because she was close enough to the events here in dispute to provide very significant insights but without the apparent biases of other witnesses. Also highly

credible in the Court's view was the testimony of Mrs. Vivian Perry, who was SSC Food Services Director during some of the period at issue. Like Ms. Corley, this witness had direct acquaintance with many aspects of the case and no suggested bias. Both Ms. Corley and Mrs. Perry are black.

4. Two other faculty members also played significant roles in the incidents at issue. Dr. Thomas Byers was Dean of the College and Dr. Hall's immediate superior during much of the relevant period. He was responsible for investigating charges against the plaintiff, and, more specifically, appointed the committees which made recommendations to Dr. Prince Jackson, who was President of Savannah State until replaced by Dr. Hall in 1978. Dr. Jackson had final responsibility for determining plaintiff's employment status during his tenure as President of SSC.

5. Plaintiff Dr. Anita Lincoln was employed at SSC under a series of four one-year contracts covering the academic terms 1974-75, 1975-76, 1976-77, and 1977-78. Dr. Lincoln was a non-tenured professor of home economics, teaching courses in dietetics and also more general subjects from September, 1974 until spring, 1977, when she was suspended from her duties because of incidents which are outlined below. During the 1977-78 academic year she was employed at SSC in a non-teaching capacity. Dr. Lincoln was not offered employment for the 1978-79 academic year. She had not worked regularly since leaving SSC in September 1978. She has sought employment in academic and other areas since that time. Testimony of Dr. Lincoln.

Background Problems

6. Dr. Lincoln has an extensive and impressive background in dietetics, nutrition and certain other areas generally classified under the rubric "Home Economics." Testimony of Dr. Hall. Dr. Lincoln has also had considerable experience in governmental and administrative work relative to her areas of expertise. Terrell. This training and experience made Dr. Lincoln an attractive and apparently highly qualified addition to the SSC faculty when she was initially hired. Hall, Terrell.

7. Despite acknowledged expertise in her specialized fields, Dr. Lincoln had limited familiarity with certain practical and elementary aspects of home economics. Plaintiff was particularly uncomfortable in introductory level courses. She had done little teaching of such subject-matter and professed not to recall much of what she had been taught when a student herself. Dr. Lincoln also indicated that she was not well prepared to teach courses which involved laboratory instruction i.e., preparation of foods in a demonstration kitchen. Nonetheless, Dr. Lincoln was required to teach courses in these fields. It was believed that her background should have well-prepared her for these responsibilities. Hall, Terrell. This understanding may have derived from assurances given by Dr. Lincoln at the time of her initial employment interview at SSC. *Id.*

8. Dr. Lincoln apparently encountered problems with students and faculty at SSC almost from the beginning of her tenure. Dr. Lincoln's difficulties with Mrs. Terrell in particular may have reflected in some part typical problems associated with a new job in new surroundings. Hall. Some can be clearly be traced to differing concepts of professional responsibility. Both Dr. Hall and Mrs.

Terrell viewed themselves as plaintiff's "supervisors." Apparently, Dr. Lincoln was accustomed to much more independence in her professional role. Hall, Terrell.

In any event, considerable friction developed between Dr. Lincoln and Mrs. Terrell often over matters which appeared to have little intrinsic significance. For example, Mrs. Terrell objected strenuously to Dr. Lincoln's changing the meeting place of a class without notifying her. However, it appears that this was done at students' request, without causing inconvenience to anyone, and without intent to violate college rules. Lincoln. Testimony of Gloria Hall (a student). Mrs. Terrell was also much distressed by her belief that the plaintiff told students that certain information Mrs. Terrell had given them was incorrect. This, according to Mrs. Terrell, amounted to "instigating unrest" and promoting "social anarchy."

Stated in more general terms, Mrs. Terrell found Dr. Lincoln "resentful and condescending." Mrs. Terrell complained that plaintiff "would not accept me as her advisor" and was otherwise "insubordinate." Mrs. Terrell believed that plaintiff was particularly and excessively critical of the facilities available at SSC. She was therefore "bound and declared to have a replacement who would and could teach" students she described as "our young girls." This evaluation was largely shared by Ms. Wagner and Dr. Anthony.

9. Conflicts between Dr. Lincoln and Mrs. Terrell, which might well have developed in any event, were much exacerbated by racial considerations. Race was a familiar if not constant topic of conversation and consideration at SSC. Hall. Mrs. Terrell was apparently

highly conscious of race [1] and highly sensitive to racial slights.[2] Mrs. Terrell tended to view her disputes with the plaintiff in a racial light. Conflicts were not merely with another teacher but with "this white lady," who thought she was "going to get some easy retirement." Testimony of Vivian Perry.

Mrs. Terrell tried to influence blacks on the SSC staff against Dr. Lincoln. *Id.*

10. Dr. Hall also was acutely conscious of racial differences in dealing with faculty members. He expressed a preference for replacing Mrs. Terrell as department chairman with a black. Jackson. While he did not accept Mrs. Terrell's criticisms of Dr. Lincoln immediately, and he, in fact, found plaintiff rather friendly, he still tried to influence blacks against her, at one time stating that "there's just something wrong . . . something wrong. I've got to do something about her." Perry. He also stated in the presence of a black faculty member that he "hate(d) white people" because of the way they had treated his father. Testimony of Ms. Martha Corley.

The Student Petition and Administrative Responses

11. Mrs. Terrell became dissatisfied with plaintiff's performance early in Dr. Lincoln's tenure at SSC. This dissatisfaction was registered with Dr. Hall on numerous occasions. Defendant's Exhibit 6. As department chair-

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[1] Dr. Lincoln testified that Mrs. Terrell stated to her "on many occasions" that, even though Dr. Anthony was white, she was really "one of us" because her sister's skin was "almost as dark as mine." Dr. Anthony is of Lebanese ancestry.

[2] Dr. Lincoln also testified that Mrs. Terrell told her of being ostracized by local whites in her professional role. Mrs. Terrell hotly disputed this statement, claiming that she had always had good relations with whites while at SSC and before as well.

man, Mrs. Terrell also made several official requests that plaintiff not be rehired. Subsequent to her retirement in June, 1976, Mrs. Terrell continued efforts to have the plaintiff terminated. Mrs. Terrell was still present on campus regularly and, by her own testimony, at the very least in direct contact with students who developed and circulated a petition for Dr. Lincoln's immediate removal from the SSC faculty. Mrs. Terrell testified that she provided "nothing in writing" to students. However, she did indicate that she "gave support for the signing" and otherwise helped in any way she could. In fact, it is probable that she personally drafted most or all of the petition. Lincoln, Corley. Many witnesses indicated that the language in the petition, particularly academic jargon such as "competency based instruction," was almost certainly not student diction.[3] Moreover, the petition contained information which was known only to Mrs. Terrell and, according to her, not communicated to anyone except Dr. Hall, who stated that he had told no one. Also interesting is the fact that the first itemized complaint discusses in detail the alleged creation of "anarchy" by Dr. Lincoln, using much the same tone and diction as Mrs. Terrell employed when testifying on the same subject. Such a coincidence of phrase is difficult to accept, particularly since students intent on vocal demonstrations, militancy, boycotts and the like would hardly be expected to take offense at an alleged crime of creating "unrest." On the other hand, Mrs. Terrell's strong re-

[3] Dr. Luetta Milledge, an English professor disputed this analysis. Dr. Milledge pointed to "awkwardness" at several points in the petition which she found much more typical of student than faculty writing skills. While not disputing her characterization of the style of the petition, the Court notes that many instances of "awkward" diction, or worse, can be found in testimony from faculty members and in written exhibits, including one prepared by Dr. Milledge herself. Defendant's Exhibit 13.

action to the incident is well-established by her own testimony. Finally, it should be noted that there is considerable similarity between complaints contained in the petition concerning plaintiff's alleged deficiencies as an instructor and those previously registered directly by Mrs. Terrell to Dr. Hall. See Defendant's Exhibit 6.

Petition

13. The direct and clear appeal of the petition is racial. The document announces at the top of the first page,

> "As a group, we feel that she (Dr. Lincoln) is not interested in teaching us and feels superior to black students and black institutions. . . . This type of attitude in insulting. Other racists have been removed from Savannah Sate College. . . .

The petition then discusses with some specificity statements made by Dr. Lincoln to Mrs. Terrell concerning the poor quality of certain equipment at Savannah State, turning what may well have been an innocent and even accurate comment by Dr. Lincoln into an alleged racial slur.[4] It is only *after* this comment and Dr. Lincoln's questioning of Mrs. Terrell's advice to students are discussed that the petition takes up the plaintiff's alleged deficiencies as a teacher.

Moreover, it appears that student interest in the petition was by no means based solely on educational considerations. Several students who had signed the petition testified at trial that she was an adequate instructor, at least no worse and generally not greatly different from

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[4] Among Dr. Lincoln's undisputed contributions to SSC was the development of proposals for a substantial grant to improve facilities at the college. This grant was derived from a program to assist "underprivileged" institutions.

others at the college. Testimony of Deborah Allen, James Etta Bush, and Gloria Hall.

This testimony suggested that the petition was signed in part at least because of peer pressure more than any real complaint with Dr. Lincoln's performance. See also, FF 16. There can be little doubt that peer pressure was, in large measure, racial pressure.

Dr. Clyde W. Hall

14. Dr. Hall testified that Mrs. Terrell began complaining to him concerning deficiencies in Dr. Lincoln's performance very early in plaintiff's tenure at SSC. However, Dr. Hall was "not convinced that she was not capable," and accordingly Dr. Hall approved a second contract for the 1975-76 academic year.

Further problems developed between Mrs. Terrell and Dr. Lincoln during this second year on the faculty. In late October, 1975, Mrs. Terrell wrote a letter to Dr. Hall detailing numerous alleged inadequacies in plaintiff's performance and suggesting at least indirectly that Dr. Lincoln should be replaced. Defendant's Exhibit 3. Dr. Hall responded by holding a conference with both Dr. Lincoln and Mrs. Terrell. Dr. Lincoln indicated at this conference that she "wasn't interested in teaching lab work" and was not capable of doing such work. Nonetheless, she did say she would try to improve her performance. Hall. The meeting apparently ended with this assurance.

Mrs. Terrell wrote another letter in January, 1976 to Dr. Hall, recommending directly that the plaintiff not be offered another contract. Furthermore, Dr. Hall testified that "students were constantly talking about the shortcomings of Dr. Lincoln's teaching." He also indicated

that he had "great confidence" in Mrs. Terrell's judgment. Nonetheless, Dr. Hall remained "cautious," hoping that the situation could be "homogenized," even after another letter in May, 1976, from Mrs. Terrell recommending dismissal. Defendant's Exhibit 5.

Dr. Hall offered Dr. Lincoln a contract for the 1976-77 school year, but he also wrote her a letter indicating that "we have been badly disappointed with your performance as an effective teacher. . . . I do expect a tremendous improvement in your professional performance. If such does not prevail, I feel I cannot recommend you for reappointment." Defendant's Exhibit 6. A conference was held during the summer of 1976 to discuss this letter and again, according to Dr. Hall, the plaintiff stated that she "was going to try to improve."

Dr. Hall testified that Dr. Lincoln's performance did not in fact change thereafter. Student complaints continued, and, in October, 1976 he visited several classes and otherwise investigate to determine how well Dr. Lincoln was performing. Dr. Hall testified that he personally noted numerous serious deficiencies in her teaching methods and particularly that he found plaintiff generally ignoring required laboratory instruction. Nonetheless, Dr. Hall apparently took no action to meet these problems and in fact, no action at all until after the student petition demanding plaintiff's immediate dismissal was tendered February 11, 1977.

Dr. Hall's attitude changed significantly with the appearance of organized student protest against Dr. Lincoln. By a letter of February 18, 1977, plaintiff was suspended from her teaching duties, because the problem had "almost reached the state of anarchy" or "uprising." Nonetheless, Dr. Hall stated that he was still "trying to

tranquilize the situation." A meeting was held February 24, with Dr. Lincoln, Dr. Anthony and Dean Byers to discuss the petition. However, Dr. Hall testified than only specific student charges relating to the 1976-77 academic year were reviewed. Racial charges were not discussed since he considered them entirely inappropriate as a basis for action. Dean Byers also held a meeting between plaintiff and students in a futile attempt to "restore confidence."

Dr. Anthony, by a letter of March 10, 1977, recommended "immediate" termination of the plaintiff based on "incompetency and lack of accountability, together with her failure to reestablish rapport with the students." Defendant's Exhibit 11. But, Dr. Hall still felt that the situation could be resolved by "improvement or resignation." He, therefore, asked Dr. Anthony to withdraw her request. When she refused, her letter became the "official basis" for steps which led to plaintiff's leaving Savannah State.

Dr. Hall took no action to determine the true origins of the student petition even after discovering that it had been typed in his office on college stationery, despite the fact that this petition was at least a major reason for plaintiff's dismissal and the focal point for campus unrest which he obviously considered extremely serious. Dr. Hall thus had good reason to know that student attacks on plaintiff's competence were at least in part a pretext masking other parties, yet he chose to accept them at face value and to use them as the basis for recommending plaintiff's termination.

In sum, Dr. Hall's action suggest that he was not in fact convinced that Mrs. Terrell's criticisms were justified, especially during the 1974-75 period. Thereafter, Dr.

Hall may have found them more convincing. But, even in the fall of 1976, after he had personally observed various alleged deficiencies, Dr. Hall was not inclined to act. It was only after he found that students had been mobilized and that plaintiff's faculty opponents could not be mollified that he began moving for plaintiff's dismissal. Even then, he felt that Dr. Lincoln's performance was not beyond redemption or at least that immediate, involuntary termination was uncalled for.

Committees

15. After mediation attempts had failed, a faculty committee was appointed to review student charges. It was apparently the first such investigation ever conducted at SSC. Byers. This "friendly committee" consisted of Ms. Wagner as departmental representative and two other faculty members from unrelated disciplines, Dr. Luetta Milledge and Mrs. Gaye Hewitt. The committee was charged with making an "investigation and recommendation" to President Jackson concerning dismissal. This committee held one meeting at which testimony from nine students and Dr. Anthony was received. By a letter of March 21, 1977, the committee indicated that the charges were generally sound and that Dr. Lincoln should be suspended for the remainder of the year and not renewed, or, alternatively, that she be dismissed at once. Defendant's Exhibit 13. Dr. Lincoln was informed by President Jackson shortly thereafter that she was being terminated for cause. Defendant's Exhibit 14. This decision was made despite the fact that President Jackson did not consider the case against plaintiff convincing. Jackson.

Dr. Prince Jackson

16. Subsequently, Dr. Lincoln appealed her termination and a second faculty committee was appointed to review the matter. This committee also interviewed students and faculty. The committee found that Dr. Lincoln was in fact incompetent, though there was a minority report questioning the sufficiency of the evidence. The committee was also highly critical of unnamed faculty members who it found to have exploited and manipulated student unrest to force action against Dr. Lincoln. In particular, the committee found strong evidence of improper faculty involvement in the petition's drafting and circulation. There was special doubt cast on the petition by its "highly improbable student language," Testimony of committeeman Dr. Kenneth Taylor.

This committee recommended that Dr. Lincoln be given temporary employment so as to allow an opportunity for her to resign. In considering this recommendation, President Jackson conducted his own investigation of circumstances surrounding student unrest. Dr. Jackson testified that students told him of being called from class to a teacher's office one-by-one to sign. One student stated that a black teacher, not in home economics, withheld a grade until she signed. Another stated she had signed out of fear that she would not be graduated otherwise. President Jackson also concluded that it was "obvious" that the petition was not written by the alleged student leader.

President Jackson thus determined that Dr. Lincoln had "gotten a bad deal." He regarded the case against her as "weak." He did not believe that she was incompetent. In fact, he considered her "as competent as anybody we had out there" and, moreover, was "under the impression" that Dr. Lincoln had displayed concern for students

which was "beyond the ordinary call." President Jackson therefore decided to offer Dr. Lincoln another employment contract despite Dr. Hall's letter stating that "the integrity of this institution would be threatened if she were reinstated." Defendant's Exhibit 18.

17. Dr. Lincoln was in fact retained at SSC for the 1977-78 school year at a salary of $17,650. However, her job assignment was changed drastically. She was completely removed from the Home Economics Department and all teaching responsibilities. Instead, she was assigned to Dean Byers' office and given the primary task of updating the faculty handbook. Dr. Lincoln was also involved in solicitation of grants for the college. President Jackson indicated that he would review her status at the end of the 1977-78 school year. However, it is clear that there was no thought of returning Dr. Lincoln to her teaching duties or continuing her in any normal faculty capacity.[5] Dr. Lincoln was to be retained only if she generated sufficient outside funding to pay her salary. Defendant's Exhibit 21.

Dr. Hall had assumed the position of Acting President when the time for review of plaintiff's status arrived. In accord with Dr. Jackson's plan, Dr. Hall requested that plaintiff submit to him an accounting of her work during the 1977-78 year. Dr. Lincoln did not comply with this request. She felt that, in view of Dr. Hall's strong opposition to her retention, no purpose would have been served by

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[5] In his testimony, Dr. Hall described the position contemplated as one where SSC would "give her that money just to sit around and not do anything." Dr. Jackson described his decision offering employment as "in accordance with the recommendation of the appeals committee." Defendant's Exhibit 19. That committee suggested that "in order to afford the defendant the opportunity to resign . . . she be given temporary employment other than in a classroom situation provided funds are available."

such a review. Dr. Hall indicated that since no information was received from the plaintiff, he made no offer to her.[6] However, it is most unlikely that plaintiff would have been retained in any event, since no suggestion was made that plaintiff had in fact generated sufficient funding to pay her salary as Dr. Jackson required. Moreover, Dr. Hall's belief that she should have been removed was already well-documented. Defendant's Exhibit 18. Dr. Hall was also extremely concerned with the possibility of strong, disruptive student reaction to any favorable consideration of Dr Lincoln.[7]

Conclusions of Law

1. This Court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

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[6] Dr. Hall's specific testimony was as follows: "Since I did not receive a reply from her concerning what she had done, and I had made the request in order to try to carry out the mandate of Dr. Jackson, I did not offer her a contract for the next year."

[7] Other significant considerations also pointed against any realistic possibility of plaintiff being retained on the SSC faculty. Both custom and enrollment figures dictated a home economics faculty of not more than four members, even though Dr. Lincoln may have been technically included as a fifth instructor during the 1977-78 academic year. Jackson. When Ms. Corley returned to the department in 1976, she in effect occupied the spot vacated by Mrs. Terrell's retirement. Had no such place been available, it would presumably have been necessary to dismiss Ms. Wagner, who had been appointed temporarily in 1973 when Ms. Corley went on leave of absence. However, this arrangement could not continue indefinitely because a new department head was being sought for Mrs. Terrell's slot. Dr. Hall personally favored appointing Dr. Harper, a long-time friend, and a black which he considered "an important consideration." Jackson.

Thus, Dr. Hall would have faced a choice between terminating Ms. Wagner who was black or Dr. Lincoln who was white and certainly very unpopular, or simply not hiring Dr. Harper. Dr. Hall obviously determined to retain Dr. Harper and not the plaintiff. Apparently, Dr. Harper was in fact assigned to the plaintiff's position. ackson.

The parties stipulated at trial that all jurisdictional prerequisites had been satisfied.

2. The present case is an equitable proceeding in which the right of trial by jury does not apply. *Blum v. Gulf Oil Corporation*, 597 F.2d 936, 938 (5th Cir. 1979). Therefore, the jury verdict on the §1981 claim was purely advisory. The Court makes its own independent determination of issues involved in this aspect of the case.

3. In a Title VII case, the plaintiff bears the ultimate burden of proof with respect to her claim of racial discrimination. *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980). With respect to a claim of discriminatory non-renewal, plaintiff establishes a prima facie case of discrimination by showing that: (1) she belongs to a group protected by Title VII; (2) she sought and was qualified for a job from which she was suspended and not rehired; (3) she was not renewed despite her qualifications, and (4) after her rejection, the position remained open and the employer sought or retained applicants having plaintiff's qualifications and not in plaintiff's protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979).

4. In the present case, before analysis can be made of these factors, the Court must first determine whether and by whom the plaintiff was in fact denied renewal at SSC. Dr. Hall of course had the final opportunity to offer plaintiff a contract for the 1977-78 year. However, his testimony indicated that, because plaintiff failed to submit information request by him under guidelines established by Dr. Jackson, he decided not to continue Dr. Lincoln's employment. FF 17. Thus it appears that Dr. Lincoln did not formally apply for continued employment and that

Dr. Hall did not formally reject any completed application by the plaintiff.

Therefore, the Court must consider whether plaintiff waived any right to relief by not seeking renewal, or, alternatively, whether plaintiff's actions can be placed within the doctrine of constructive discharge, or, in this case, constructive nonrenewal. *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975). *Young* states the rule as follows:

> [I]f the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is liable for any illegal conduct involved therein.

509 F.2d, at 144. The employer must "deliberately" intend the conditions complained of, but it is not necessary that it specifically intend to force the employee to leave the position. *Bourque v. Powell Electric Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980).

Several factors support the conclusion that changes made by Dr. Jackson were such that Dr. Lincoln would reasonably seek no further employment at SSC. FF 17. Specifically, it appears that the hope if not intent of Dr. Jackson in removing plaintiff from a teaching capacity was that she would "resign" i.e. not seek continued employment. Certainly this was the intent of the faculty recommendation he professed to be following. Moreover, the 1977-78 contract carried with it the proviso that no further school funding could be expected. Plaintiff would in effect be working only "on commission," in clear contrast to the "top salary" she had been receiving. Plaintiff's work assignment apparently fell short of Dr. Hall's description that she would "just sit around," but it in-

volved no teaching and apparently little work much related to her professional training. She was mostly occupied with an administrative chore of dubious significance and short duration. Finally, plaintiff was put in the position of having her performance evaluated by Dr. Hall, who was already on record as believing that the "integrity of the institution" was impuned by her continued employment.

In view of all these circumstances the Court must conclude that plaintiff's failure to complete her renewal application resulted from her reasonable belief that she had in effect been rejected already. Continued employment had become both unlikely and unattractive. Moreover, the Court concludes, that even had Dr. Lincoln complied with Dr. Hall's request, she would not have been continued at SSC. Dr. Jackson indicated that additional funding for plaintiff's employment would come, if at all, from outside sources. There is no reason to believe that plaintiff had generated such funding in the requisite amounts.

Therefore, whether one views plaintiff as rejected based on her failure to apply or, alternatively, in light of her inability to meet Dr. Jackson's criteria for continued employment, it is clear that plaintiff was not renewed as a direct consequence of steps taken by Dr. Jackson. Hence, the Court must base its determinations on Dr. Jackson's conduct and the reasons behind his decision. Furthermore, the defendant Board of Regents are clearly accountable for these actions under the doctrine of *respondeat superior*, since Dr. Jackson was then proceeding under broad authority granted to him by the Board to supervise operations at SSC. *Calcote v. Texas Educational* Foundation, 578 F.2d 95, 97 (5th Cir. 1978), FF 3(a), FF 1.

5. Plaintiff has established a prima facie case of racial discrimination. Plaintiff was in a racial minority at SSC. Whites were outnumbered by blacks approximately two to one in both the faculty and the student body. Second, the Court determines that plaintiff did seek employment at SSC. She did so actively and directly prior to 1977-78. Her failure to do so for the succeeding year was the direct result of defendant's deliberate course of conduct. Furthermore, it is apparent that, in Dr. Jackson's view at least, plaintiff was qualified for the position. She was a competent instructor who "got a bad deal" as a result of unfounded faculty criticisms and manufactured student unrest. Third, it is clear that the 1977-78 contract and related developments amounted to constructive nonrenewal of the plaintiff, even though her formal termination from the faculty came later. CL 4. Finally, it is clear that plaintiff's teaching position was filled thereafter by a black woman. This conclusion remains unchanged whether one views Dr. Harper or Ms. Wagner as her replacement.

6. The burden therefore falls to the defendant to articulate some nondiscriminatory basis for plaintiff's nonrenewal. Defendant has, of course, suggested that this action was based on completely non-racial charges of incompetence, lack of "rapport with students," and the like. However, in view of Dr. Jackson's specific and direct statements that he investigated these charges and found them baseless, defendant's arguments obviously must be rejected. Defendant has failed to show that these nonracial considerations in fact contributed to the decisions leading to plaintiff leaving SSC. On the other hand persuasive evidence that race was the predominate reason is clear. Dr. Hall separated racial charges from alleged academic deficiencies early in the review process. Dr. Jackson later rejected these academic allegations. With teaching

inadequacies specifically ruled out as the basis for Dr. Lincoln's non-renewal, there would seem to be no reasons left but the racial attacks Dr. Hall had himself rejected as improper. To be sure, these charges did not directly demand that Dr. Lincoln be removed because she was white. But, there can be no doubt that they could not have been brought at all much less pressed with the "militancy" found here but for the fact that plaintiff is white. Plaintiff's race was the significant factor in the initial impression of her which developed in the Home Economics Department. It was the basis for efforts to develop faculty sentiment against her thereafter, and finally the focus for student unrest which was created thereafter. Of course, the Court does not hold that plaintiff was a perfect teacher or a perfect colleague. The Court does find that but for her race, plaintiff would not have been denied renewal as she was. This is all that is required under Title VII. *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273, 282 N.10 (1975). See also *Garcia v. Gloor*, 609 F.2d 156, 160 (5th Cir. 1980).

Summary

This case presents to the Court evidence which is often contradictory, confused, and at points quite sketchy. The Court is unwilling to conclude from this evidence that any of the parties were necessarily overtly or intentionally racist in their treatment of Dr. Lincoln. Nonetheless, racial animus is apparent in several respects. Dr. Lincoln's conflicts with other faculty members became far more severe and damaging because she was viewed as an "outsider" and more important as a *white* outsider. Resentment against her was apparently much magnified because of this racial difference. Thus her failings however real were dealt with much more severely than might have been

true of a black professor. Secondly, Dr. Lincoln was subjected to student pressure principally through the petition because she was white. Racial differences made it easy for faculty members to manipulate students against Dr. Lincoln in ways that could not have been done with a black professor and for offenses that likely would have aroused far less concern without the addition of racial differences. Finally, administrators' handling of Dr. Lincoln was tainted by racial considerations. Both Dr. Hall and Dr. Jackson admitted that student pressure was a major force in decisions which led to her termination. This pressure was, as I have indicated, racial in significant part, yet it led Dr. Jackson to dismiss plaintiff and then reinstate her to a most insecure post when he did *not* think her incompetent or indifferent to students. It also led Dr. Hall to work for plaintiff's termination when direct knowledge of her alleged academic deficiencies had not caused him to act, in part, to avoid "anarchy" and in part, to avoid having to terminate a black teacher and retain a white.

The Court thus concludes that Dr. Lincoln was subject to harassment, provisional termination, and finally nonrenewal, not because she was incompetent but because she was white and being white had made her unpopular in ways and to degress completely disproportionate to any actual conduct by her.

Remedies

The above findings authorize and the plaintiff here seeks relief in the form of backpay, reinstatement and attorney's fees. Plaintiff testified that she had made serious, though unsuccessful efforts to find employment during the pendancy of this case. FF 5. No evidence was presented at trial to suggest that due diligence was not

exercised. Moreover, the Court is certainly aware of difficulties created by plaintiff's age and the circumstances surrounding her leaving SSC. The Court will therefore permit recovery of two years backpay as provided for under Title VII. *See* 42 U.S.C. § 2000e-5(g). The Court will also permit recovery of reasonable attorney's fees. Thirty days will be allowed from the date of this order for the parties to reach agreement on the proper amount of these fees, or, alternatively, for counsel to submit appropriate information to the Court for calculation of an award.

The Court is, however, not of the opinion that reinstatement can properly be ordered under the peculiar facts of this case. While Title VII does provide that reinstatement "may" be required, it is also clear that, as with any equitable remedy, it is to be controlled by the sound discretion of the Court. This, of course, includes the prerogative to decline such relief, though

> only for reason which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole from injuries suffered through past discrimination.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). See also *E.E.O. v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 926, (S.D. N.Y. 1976); *Vant Hul v. City of Dell Rapids*, 462 F.Supp. 828, 834 (D.S.D. 1978).

In the present case, several factors point strongly against reinstatement. First, this case has clearly produced unusual friction, beyond that normally incident to litigation, between parties. The small size of the Home Economics Department and the apparent necessity that its members work together closely must mean that this friction would have a serious impact on the quality of per-

formance of important academic functions. Second, it appears from the evidence adduced at trial that plaintiff's position was by no means secure at the time the incidents complained of developed. While the Court does find that the actual motivation for plaintiff's termination was racial and hence impermissible, it is clearly possible that other legitimate problems might have led to plaintiff's non-renewal at some later time. Whether plaintiff would have remained at SSC indefinitely is therefore quite speculative. Most importantly, the evidence introduced at trial including plaintiff's own testimony, tended to show that there were significant gaps in her competency as an instructor. FF 7. Reinstatement would presumably mean that plaintiff would again be forced to teach in areas where she lacked the requisite skills and experience.

In view of all these facts, the Court does not feel that reinstatement is appropriate in this case. Therefore, the defendant will be required to purge its records of all references to this extremely unfortunate incident, but the Court will not order additional relief beyond the backpay and attorney's fees outlined above.

This 17th day of December, 1980.

/s/ B. Avant Edenfield

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

H. ANITA LINCOLN,
Plaintiff

VS.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and CLYDE W. HALL, and EVANEL R. TERRELL,
Defendants

CV 479-340

JUDGMENT

The above case was heard on November 3-5, 1980. Defendants CLYDE W. HALL and EVANEL R. TERRELL received a jury verdict in their favor as to the 42 U.S.C. 1981 claim of Plaintiff on November 5, 1981. The Court entered an Order on December 17, 1981 awarding the Plaintiff Title VII relief against the Defendant BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA. Plaintiff was awarded the amount of THIRTY FIVE THOUSAND THREE HUNDRED ($35,300.00) DOLLARS as back pay. Defendant BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA was further ordered to purge its records regarding the circumstances surrounding the non-renewal of Plaintiff as an employee. Pursuant to an Order dated the 23rd of February, 1981, Plaintiff was awarded the sum of SIX THOUSAND THREE HUNDRED FORTY-NINE AND 75/100 ($6,349.75) DOLLARS in attorney fees and costs of litigation. It is

hereby Ordered and Adjudged that the Court's Orders of December 17th, 1980, February 23rd, 1981, and the jury's verdict in favor of CLYDE W. HALL and EVANEL R. TERRELL, be made the Judgment of this Court and that Judgment be entered against the Defendant BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA in the amount of FORTY-ONE THOUSAND SIX HUNDRED FORTY-NINE AND 75/100 ($41,649.75) DOLLARS.

SO ORDERED this 9th day of March, 1981.

/s/ B. Avant Edenfield

JUDGE, UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA, SAVANNAH DIVISION

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7297

D.C. Docket No.CV479-340

H. ANITA LINCOLN,

Plaintiff-Appellee,
Cross-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, AND CLYDE W. HALL AND EVANUEL R. TERRELL,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court for the Southern District of Georgia

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Before RONEY and HATCHETT, Circuit Judges, and WISDOM*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants, cross-appellees pay to plaintiff-appellee cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

February 10, 1983

HATCHETT, Circuit Judge, dissenting

*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7297

H. ANITA LINCOLN,

Plaintiff-Appellee,
Cross-Appellant,

versus

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and CLYDE W. HALL and EVANEL R. TERRELL,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 10, 11 Cir., 1983, ____ F.2d ____).

(April 25, 1983)

Before RONEY, HATCHETT and WISDOM*

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PAUL H. RONEY

United States Circuit Judge

*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Office
FILED
JUL 16 1983
STEVAS

No. 82-2050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,

Petitioners,

v.

H. ANITA LINCOLN,

Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITIONER'S "PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT"

JOHN J. SULLIVAN
GILBERT L. STACY
Attorneys for Respondent

Please Address All
Correspondence to:

JOHN J. SULLIVAN
208 East Bay Street
Savannah, Georgia 31401
(912) 233-0213

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I

QUESTION PRESENTED FOR REVIEW

Respondent takes issue with Petitioner's characterization of the Question Presented for Review as a judicial restructuring of a case to affix liability against a State Agency which prevented the State Agency from defending a claim of which it had neither notice nor an opportunity to present a defense.

The correct questions should be:

1. Is a Title VII Defendant denied "due process" notice and a right to defend, where in the same action, a Plaintiff pursues a parallel § 1981 claim, electing not to sue all potential §1981 Defendants whose activities may cause the Title VII Defendant's liability; and the trial court determines the Title VII Defendant's liability because of the activities of agents other than the named § 1981 Defendants?

2. Can a Title VII Defendant who stipulated to the timeliness of an EEOC charge during the trial of a case, later attempt to show that the filing of the EEOC charge was untimely, when the record

is silent as to the actual date of the filing?

II

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IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Const., Amend. V:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U. S. Const., Amend. VII:

> "In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

42 U. S. C. § 2000e - 2:

"(a) It shall be an unlawful employment practice for an employer -

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;..."

42 U. S. C. § 2000e - 5:

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...

* * *

(g) If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action

as may be appropriate, which may include but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate..."

V

STATEMENT OF THE CASE

The case was brought before the trial court pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., against the BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA (BOARD), and the Civil Rights Act of 1866, 42 U.S.C. § 1981, against EVANNEL R. TERRELL and CLYDE W. HALL. Respondent was employed as a Home Economics instructor at Savannah State College (SSC), an institution governed by the BOARD. Respondent is a white female. SSC is a predominately and historically Black learning institution. Dr. Lincoln alleged that she had been the victim of racially motivated attacks on her fitness as an instructor, directly or indirectly carried out by the individual Defendants HALL and TERRELL in violation of §1981. Plaintiff also alleged the Defendant BOARD was liable under Title VII for her non-renewal or discharge, by its agents.

The trial of Plaintiff's claims was held on November 3 through 4, 1980. The court utilized the jury in an advisory capacity to determine the question of Title VII liability. The § 1981 claim against HALL and TERRELL was tried by the jury. The jury

returned a verdict for the individual Defendants in the §1981 action; however, by advisory verdict, the jury found in favor of Dr. Lincoln with regards to the Title VII claim against the BOARD.

On December 17, 1980, the court made findings of fact and conclusions of law which held Title VII liability against the BOARD. In that order, the court awarded two (2) years full back pay, court costs, and attorney's fees. The court, in awarding the full two (2) years back pay, noted that Plaintiff had made unsuccessful attempts to secure employment, but was unable to because of the circumstances surrounding her departure from SSC and her age (60).

During the trial of the case, (Transcript, Page 20) the BOARD stipulated that the requisite EEOC charge was timely filed by Dr. Lincoln and that she was timely in bringing suit. Neither Plaintiff nor BOARD introduced evidence relating to when the EEOC charge was filed. References by the Petitioner to any specific filing date is improper because it relates to matters outside of the record.

The trial court affixed the Title VII liability against the BOARD largely because of the acts of Dr. Prince Jackson, who was then the President of SSC. The court concluded that President Jackson was responsible for her constructive discharge. Dr. Jackson was not a named party in the §1981 action. Despite Petitioner's claims to the contrary, President Jackson's role in Dr. Lincoln's dilemna was known prior to trial by the BOARD.

Extensive discovery was conducted prior to the trial and on May 9, 1980, President Jackson's deposition was taken. (see appendix) Furthermore, in the Proposed Pre-Trial Order filed by both parties on September 26, 1980, which was made an order of the court on October 1, 1980, President Jackson's name appeared on the Plaintiff's list of forty witnesses as an adverse witness, the only adverse witness listed by the Plaintiff. Although Plaintiff's original complaint accused the BOARD of discrimination "through its agents, Defendants CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER" (subsequently dismissed by Plaintiff), it also alleged generally that

she was discharged "so as to provide a vacancy that was filled with a Black Female" and "because she was white and for reasons for which Blacks are not terminated". These allegations directly relating to the termination itself did not mention the named Defendants as agents or otherwise. Furthermore, the amended complaint deleted the Board from the fist quoted allegation, which then included only the individual Defendants. At this point, the Board's liability could only be predicated upon the more general allegations that followed. Additionally, Plaintiff's proposed jury charge contained in the Pre-Trial Order of October 1, 1980, relating to the Title VII claim referred to the Board "acting through its employees at Savannah State College" without specifying the individual Defendants as the employees in question. (see appendix)

VI

REASONS FOR DENYING THE WRIT

First and foremost, the Court should deny Petitioner the writ, because it is now attempting for the first time to assert defenses by the introduction of evidence that was not presented to the trial court. The petition at page 15, presents excerpts from Respondent's EEOC charge which was never tendered, much less introduced into evidence and therefore is not a part of the record. Furthermore, on page 16 of its petition, it asserts that Respondent made an untimely filing of her EEOC charge. This is in contradiction to the trial conduct of Petitioner wherein it stipulated to the timeliness of Respondent's EEOC charge and her bringing of the action within the requisite "right to sue' period. (Trial transcript, page 20). Where a party assents to a stipulation, it may be admitted as conclusive proof as to the contents of the stipulation. United States v. Payne, 474 F.2d 603 (10th Cir. 1973).

The decision by Petitioner to stipulate to the timeliness of the EEOC charge is a matter peculiar to the case at hand, and

Petitioner's trial strategy will affect few others than the litigants in this case.

Furthermore, both the trial court and appellate court were correct in holding that the exclusion of President Jackson in the § 1981 claim did not preclude a finding that the Board was culpable for his actions. Petitioner's protestations that liability based on President Jackson's conduct was violative of its "due process" right to notice does not mesh with the facts of the case or law. The law of respondeat superior does not require that a Plaintiff also sue the agent whose conduct is the underlying reason for its employer's liability. McDonough Marine Services, Inc. v. M/V Royal Street,608 F. 2d 203 (5th Cir. 1979). Just as Petitioner had reasons for stipulating to the timeliness of the EEOC charge, Respondent had strategic reasons for not naming President Jackson as a party.

Despite Petitioner's representations, Respondent never continuously maintained that the Board was liable because of the exclusive conduct of the named § 1981 Defendants. The

petition at page 9 has misstated by omission the facts of the case. The quoted material on that page of paragraph 6 of the Original Complaint does state that the Board acted through the §1981 Defendants. What is omitted however, is the amended complaint which recasts paragraph 6, striking all reference to the Title VII Defendant and deals strictly with § 1981 liability against the Defendants. The Title VII claim is then presented in general terms without naming any employees.

Petitioner had numerous clues that should have alarmed it that its liability could hinge on the conduct of other individuals, including President Jackson. As previously mentioned, President Jackson was listed months before trial as an adverse witness, the only adverse witness out of forty witnesses listed by her. Respondent has already mentioned other factors in her Statement of the Case, which should have alerted Petitioner that its Title VII liability could be based upon the conduct of other employees.

Because of the peculiar facts of this case, there are no important legal issues

to be resolved by the Court. Respondent believes that the decision of the appellate court was a correct one and is not in conflict with decisions of other circuits and therefore not worthy of review by this Court. Respondent requests that the Writ be denied.

John J. Sullivan

Gilbert L. Stacy

APPENDIX

Appendix

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

H. ANITA LINCOLN	]	
Plaintiff	]	
VS	]	CIVIL ACTION NO.
	]	CV 479-370
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, and CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER	]	
Defendants	]	

AMENDMENT TO COMPLAINT

NOW COMES H. ANITA LINCOLN, Plaintiff in the above-styled action and amends her complaint by deleting previous paragraphs 2,6,7 and 8, and recasting them as follows:

2. This is a proceeding for a declaratory judgment as to Plaintiff's rights and for a permanent injunction enjoining Defendant, BOARD OF REGENTS, from maintaining a policy or practice of discriminating against Plaintiff because of race or color with respect to its failure to rehire her for the academic year 1978-1979.

6. Defendants CLYDE W. HALL, EVANEL R. TERRELL and DIANA WAGNER, with intent and purpose, engaged in activities to terminate the Plaintiff from her employment at Savannah State College and prevented her rehiring because of Plaintiff's race.

7. That Plaintiff was not rehired to her position as instructor so as to provide a vacancy that was filled with a Black Female.

8. Plaintiff was not rehired because she was white, and for reasons for which Blacks are not terminated.

Respectfully submitted,

_____
John J. Sullivan

_____
Gilbert L. Stacy
Attorneys for Plaintiff

EXCERPT OF PRE-TRIAL ORDER
(Record, page 50) of October 1, 1980

Plaintiff's Witnesses

(1) Plaintiff will have the following witnesses present at trial.

H. Anita Lincoln

William Moore, U. S. Attorney

Vivian Perry

Dr. Prince Jackson (as an adverse witness)

(2) Plaintiff may have the following witnesses present at trial.

Corrie Lee Heyward

Webayehu Asseged

Alvin Cook

Gloria P. Hall

Deborah Pelote Allen

Martha Corley

Hayward S. Anderson

Dr. Thomas Byers

Isaiah McIver

Sister M. Julie Maggioni

Althea V. Morton

Steven R. Smith

Kenneth E. Taylor

Wilma Adams

James Etta Bush

Huddie Culbreth
Marcia A. Cutter
Brenda Duhart
Eloise Formey
Maxine Hazel
Harry Hezekiah
Cheryl E. Jenkins
Annie E. Martin
Annie F. Phillips
Regina Poaches
Millicent Relaford
Cheryl Robinson
Netha Steplight
Gloria Sapp
Pearl Smalls
Sharon Thomas
Winifred Trim
Gloria S. Underwood
Diann Walker
Mary T. Waters
Judy Wilder

PLAINTIFF'S PROPOSED TITLE VII JURY CHARGE
CONTAINED IN THE PRE-TRIAL ORDER OF OCT. 1, 1980
(Record, Pages 67-68)

The Plaintiff, Miss Lincoln, contends that the BOARD OF REGENTS, acting through its employees at Savannah State College violated a federal law relating to her employment by failing to rehire her for the academic year 1978 - 1979. The BOARD OF REGENTS contends that it violated no law in rehiring her for the academic year. Unless this federal law was violated the motives of the BOARD OF REGENTS in failing to rehire her are legally immaterial. In order to determine whether or not the law was violated you must answer the following questions "Yes":

Was Miss Lincoln in a racial minority at Savannah State College?

Was she qualified for her position?

Despite her qualifications, was she rejected?

Was someone else hired in her place or position not in her race? 1/

If you answer "No" to any or all of the questions, you must return a verdict in favor of Defendant BOARD OF REGENTS. If "Yes" is the answer to the above four questions, your decision as to whether or not her rights were violated must not stop here. The law requires that you then consider whether

the preponderance of evidence shows whether or not the BOARD OF REGENTS acting through its employees [2/] at Savannah State College had nondiscrimintory reasons for failing to rehire her. If your answer is "No", you must decide whether or not the preponderance of evidence shows that race was a significant or determining factor in her failure to be rehired. If race was a significant or determining factor in her failure to be rehired. If race was a significant or determining factor in the employees' decision, then you shall return a verdict in Plaintiff's favor. If the BOARD OF REGENTS, acting through its employees at Savannah State College had nondiscriminatory reasons for failing to rehire her you must decide whether or not the preponderance of evidence shows that its reasons for failing to rehire her were a ruse or sham for disquising a racially discriminatory decision. If you determine that the justification was a sham or ruse for disquising a racially discriminatory decision and that the decision was a significant or determining factor in failing to rehire her, then you shall return a verdict in her favor

against the BOARD OF REGENTS. If, on the other hand, you decide its reasons were not a sham or ruse, then you should return a verdict for the Defendant BOARD OF REGENTS.

If a verdict is rendered against the BOARD OF REGENTS, the Court in this instance will only award the appropriate damages.[3/]

1/ Whiting v. Jackson State University, 22 FEP Cases 1297 (5th Cir. 1980)

2/ Addison v. Certain-Teed Products Corporation, CV 477-98 (SD Ga. 20 Nov., 1979)

3/ Whiting, Supra.

EXCERPT FROM BILL OF COSTS SHOWING
DEPOSITION OF DR. PRINCE JACKSON
(Record, Page 195)

Date		Hours
05/09/80	Deposition of Dr. Jackson and consultation with client in preparation for deposition.	4:00

CERTIFICATE OF SERVICE

I certify that I have this date served the Petitioner with the foregoing Brief of Respondent by placing three printed copies thereof in the United States mail with proper first class postage affixed thereto and addressed to Alfred L. Evans, Jr., Senior Assistant, Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334.

This 15th day of July, 1983.

SULLIVAN & STACY

BY: Gilbert L. Stacy
GILBERT L. STACY

SULLIVAN & STACY
208 East Bay Street
Savannah, Georgia
31401

(912) 233-0213

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NO. 82-2050

IN THE

Supreme Court of the United States

October Term, 1982

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, et al.,
Petitioners,

v.

H. ANITA LINCOLN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

JIM O. LLEWELLYN
Senior Assistant
Attorney General

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ALFRED L. EVANS, JR.
Senior Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Telephone: 404-656-3389

While Respondent Lincoln nowise disputes the truth of the facts stated in our Petition for Certiorari, Respondent takes umbrage over our reference to her EEOC charge, saying:

> "First and foremost, the Court should deny Petitioner the writ, because it is now attempting for the first time to assert defenses by the introduction of evidence that was not presented to the trial court. The petition at page 15, presents excerpts from Respondent's EEOC charge which was never tendered, much less introduced into evidence and therefore is not a part of the record." Brief in Opp. p., 8.

According to Respondent our presentation of these "excerpts from the EEOC charge" (the truthfulness and accuracy of which Respondent doesn't question) is "improper" because it is "outside of the record". *See* Brief in Opp., p. 5.

We would respectfully suggest that under the extraordinary circumstances of this particular case, Respondent's view of "propriety" is a bit myopic. The fact of the matter, and the reason for the filing of our Petition for Certiorari in the first place, is that the "claim" which the court below adjudicated as the basis for Petitioner's liability (*i.e.*, a "constructive discharge" *in 1977*) is itself entirely "outside the record". As we would have hoped to have made clear in our Petition, the Record (wholly without reference to the EEOC charge) shows from start to finish that the Title VII claim which Respondent in fact alleged and tried, related to a *1978* decision not to offer Respondent a faculty employment contract *for academic year 1978-1979*. In addition to what we have already pointed to respecting Respondent's unequivocal assertions that this is what her claim was (*see* Petition, pp. 9-10), it may be noted that the amendment to the

complaint which Respondent has appended to her Brief in Opposition before this Honorable Court once again reflects this plain fact that her complaint is about the "failure to rehire her for the academic year 1978-79". Brief in Opp., p. 12.

Certain it is that nothing in the Record shows, suggests, or even hints that Respondent ever thought of, much less asserted, a Title VII claim based upon a "constructive discharge" a year earlier (*i.e.*, in 1977). Under the circumstances we would respectfully submit that our reference to Respondent's EEOC charge, a reference made principally to show that the deprivation of "due process" which forms the basis of our Petition for Certiorari (*i.e.*, the deprivation occasioned by the positing of liability on a "claim" which wasn't alleged, tried or even thought of until after the trial was over and all opportunity to defend past) was real rather than merely theoretical in terms of substantial defenses being available to petitioner had the claim (*i.e.*, the purported 1977 "constructive" discharge) ever been made, is not "improper".

The second point of Respondent's Brief in Opposition which perhaps merits some response is Respondent's contention that Petitioner "stipulated" the timeliness of Respondent's EEOC charge. Suffice it to say that our stipulation of timeliness had reference to the claim which Respondent alleged and tried (*i.e.*, the *1978* decision not to offer Respondent a faculty contract for academic year 1978-79), not to a claim which wasn't alleged, tried, suggested, or so far as we are aware even thought of by anyone until after the trial was over (*i.e.*, the so-called "constructive discharge" *in 1977*).

Our Petition for Certiorari rests not on what the evidence shows respecting the defenses which were available

to Petitioner to meet the "claim" never made until the trial was over, but rests upon the fact that Petitioner manifestly has been deprived of the opportunity of presenting any defense whatsoever where the claim didn't come into being until the trial was over. It is this lack of elementary fairness in a federal judicial proceeding, something we believe goes to the very heart of "due process", which has caused us to view the decision below as being worthy of consideration by the Supreme Court of the United States.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

H. PERRY MICHAEL
First Assistant Attorney General

JIM O. LLEWELLYN
Senior Assistant Attorney General

ALFRED L. EVANS, JR.
Senior Assistant Attorney General

Please address all
communications to:

ALFRED L. EVANS, JR.
Senior Assistant Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334

(404) 656-3389